EDITOR'S NOTE

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)o. 85-1233-CFX
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inuary 22, 1986

Title: International Paper Company, Petitioner
v.
Harmel Ouellette, et al.

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Reardon, Roy L.

Counsel for respondent: Langrock, Peter F., Amestoy, Jeffrey L.

)try	Date	Note	Proceedings and Orders
1	Jan 22 1986	G	Petition for writ of certiorari filed.
2	Feb 21 1986		Brief of respondents Harmel Ouellette, et al. in opposition filed.
3	Feb 26 1986		DISTRIBUTED. March 21, 1986
4	Mar 4 1986	X	Reply brief of petitioner International Paper Co. filed.
5	Mar 24 1986		Petition GRANTED. The Solicitor General is invited to file a brief in this case expressing the views of the United States.
			**********
6	Apr 16 1986		Record filed.
7	Apr 16 1986		Certified copy of original record & C.A. proceedings received.
8	May 2 1986		Joint appendix filed.
0	May 5 1986		Order extending time to file brief of petitioner on the merits until May 19, 1986.
1	May 19 1986		Brief of petitioner Internatl. Paper Co. filed.
2	May 19 1986	G	Motion of Mid-America Legal Foundation for leave to file a brief as amicus curiae filed.
3	May 19 1986		Brief amicus curiae of United States filed.
4	Jun 2 1986		Motion of Mid-America Legal Foundation for leave to file a brief as amicus curiae GRANTED.
5	Jun 2 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
6	Jun 16 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
8	Jun 23 1986		Order extending time to file brief of respondent on the merits until July 11, 1986.
9	Jun 26 1986		Brief amicus curiae of Tennessee and Twelve Additional States filed.
0	Jul 11 1986		Order further extending time to file brief of respondent on the merits until July 14, 1986.
1	Jul 14 1986		Brief of respondents Harmel Ouellette, et al. filed.
2	Sep 4 1986		Reply brief of petitioner Internatl. Paper Co. filed.
3	Sep 12 1986		CIRCULATED.
4	Sep 3 1986		SET FOR ARGUMENT. Tuesday, November 4, 1986. (3rd case) (1 hour)
5	Nov 4 1986		ARGUED.

No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Does the Federal Water Pollution Control Act authorize a nuisance action alleging pollution of an interstate body of water to be brought against a discharger (1) in any states where an impact of the discharge is claimed and (2) under the laws of any such states? *

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* The caption of the case in the Court contains the names of all the parties to the proceedings in the court below. (The State of Vermont, as a riparian owner, has been joined as a plaintiff.) The following are subsidiaries (except wholly owned subsidiaries) and affiliates of International Paper Company: Arizona Chemical Company; Envases Internacional S.A.; Indian Lake Dam Holding Corp.; International Paper Italia; International Paper Korea Ltd., IPI Corporation; Rouviere Corporation; Productora de Papeles S.A.; and Sicilcartone S.r.l.

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IN THE

Supreme Court of the United States

October Term, 1985

No.

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR. and LOIS T. PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner International Paper Company ("IPCo."), the defendant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin,

U.S.D.J.), denying IPCo.'s motion to dismiss respondents' first cause of action, which relates to the liquid discharges of IPCo.'s plant into Lake Champlain.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in the Appendix (A1-A3). The opinion of the District Court is reported at 602 F. Supp. 264 (D.Vt. 1985) and is set forth in the Appendix (A4-A25).

The judgment of the Court of Appeals was entered November 4, 1985 (A26-A27). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statute and Rules Involved

Sections 1253, 1319, 1341, 1342, 1365 and 1370 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§1253, 1319, 1341, 1342, 1365 and 1370 are set forth verbatim in the Appendix (A28-A55).

STATEMENT OF THE CASE

This is a class action commenced on July 5, 1978 by certain residents of Vermont in Vermont's Addison County Superior Court. On July 25, 1978, it was removed to the United States District Court in Vermont on the basis of diversity of citizenship under 28 U.S.C. § 1332. The complaint has two causes of action. The first cause of action, which is the subject of this petition, claims that IPCo.'s discharges of treated effluent into Lake Champlain "constitute a continuing nuisance to the Plaintiffs." Respondents seek $20,000,000 in compensatory damages, $100,000,000 in punitive damages, and injunctive relief which would require IPCo. to restructure completely its water treatment

system. 602 F. Supp. at 266 (A6). The allegedly offending discharges are made in compliance with IPCo.'s National Pollution Discharge Elimination System permit ("NPDES" permit) (JA 53-54).* *See* discussion infra at 22-23. Respondents' second cause of action claims damages and injunctive relief for air pollution and is not at issue here. 602 F. Supp. at 266 (A6).

In April 1980, the District Court certified, for purposes of the water pollution claims, a plaintiff class comprising Vermont owners of lakeshore property in three townships of the South Lake area of Lake Champlain. The District Court later added the State of Vermont as a riparian landowner (JA 194).

On June 22, 1981, petitioner moved to dismiss respondents' first cause of action pursuant to Fed. R. Civ. P. 12(c) and 56(b), in part on the authority of this Court's decision in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"). In *Milwaukee II*, this Court held that federal common law, which it had earlier held preempted the application of state common law in disputes over interstate waters, *see Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), was itself preempted by the FWPCA. As Lake Champlain is an interstate body of water, petitioner moved to dismiss the first cause of action, arguing that *both* federal and state claims for nuisance were barred. Respondents resisted, arguing that their state law claims of nuisance survived. The District Court reserved judgment on petitioner's motion to dismiss because exactly the same question—whether state common law could be applied to resolve interstate water disputes—was at the time before the United States Court of Appeals for the Seventh Circuit in *Illinois* v. *Milwaukee*, 731 F.2d 403

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* "JA" citations are to the Joint Appendix in the Court of Appeals.

(7th Cir. 1984), *as amended,* Nos. 77-2246 & 81-2236 (May 29, 1984), *cert. denied sub nom. Scott* v. *City of Hammond,* 105 S. Ct. 979 (1985) (*"Milwaukee III"*).

On March 27, 1984, the Seventh Circuit held in *Milwaukee III* that the FWPCA permits common law nuisance actions involving interstate water pollution to be brought *only* in the courts and under the common law of the state in which the discharger is located (which in this case would be New York). Illinois petitioned for a writ of certiorari and this Court invited the Solicitor General to express the views of the United States on the case. The United States urged that certiorari was not appropriate because the Seventh Circuit had correctly construed the decisions of this Court and the FWPCA (JA 204-213). On January 21, 1985, this Court denied the petition for certiorari. 105 S. Ct. 979 (1985).

On February 5, 1985, notwithstanding the decision of the Seventh Circuit in *Milwaukee III* and the denial of certiorari by this Court, the District Court in this case denied petitioner's motion to dismiss, holding, directly contrary to the Seventh Circuit in *Milwaukee III,* that the FWPCA authorized nuisance suits to be brought in any court and under the law of any state where the alleged effects of a discharge occur.* The District Court certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and stayed further proceedings pending disposition by the Court of Appeals.

The Court of Appeals accepted petitioner's interlocutory appeal, and thereafter affirmed the District Court's denial of petitioner's motion to dismiss in a one-page *per curiam*

* The District Court also denied petitioner's motion to dismiss on two separate grounds that are not presented for review in this petition for certiorari.

opinion "essentially for the reasons set forth in [the District Court's] thorough opinion which [we] adopt in all respects. . . ." (3a). It is this judgment of which petitioner seeks review.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the decision of the Seventh Circuit in *Milwaukee III,* and with the position previously taken by the United States before this Court on the same issue. Moreover, the issue over which these two Courts of Appeal differ—whether, under the FWPCA, a state (or its citizens) may sue an out-of-state discharger in its own courts and under its own law—is plainly substantial.

The decision below exposes industries and water supply systems which must discharge effluents into interstate waters to the varying statutory and common laws of all of the states whose boundaries touch on waters into which those discharges are made, and gives rise to the possibility of irreconcilable conflicts in the legal obligations to which they will be subject. It will be difficult, if not impossible, for these dischargers to determine what constitutes an acceptable effluent discharge level. In particular, they will face not only a post facto threat of damages, premised upon unascertainable standards, but also the possibility of mandatory and prohibitory injunctions imposing conflicting and irreconcilable discharge standards. Ultimately, lay juries, applying "vague and indeterminate nuisance concepts" from their respective states' laws, may impose liability on industries in other states. This quiltwork of differing authorities threatens to render meaningless the permit scheme of the FWPCA, since dischargers will remain subject to the laws of the various states despite compliance with permits issued by the Environmental Protection Agency and by the state agency where they are located.

Establishment of downstream state jurisdiction over discharges into interstate waters would, moreover, impose a further burden on the federal system. The federal government and the upstream state share a common perspective on discharges into interstate water, as does a state regulating discharges into intrastate waters. In such cases, the sovereign deals with the question as a balancing of its significant interest in maintaining the integrity of its streams against its commercial and economic interest in exploiting an essential resource. A downstream state may lack such perspective, and consider another state's discharges as intrusive and violative because they do not serve the downstream state's interests.*

In addition, the decision would also embroil states in harmful and disruptive disputes over basic interests of state sovereignty engendered by extraterritorial regulation of dischargers which was one of the very concerns that led this Court in *Milwaukee I* to displace state law with federal common law in interstate water disputes.

While the direct conflict between the court below and the Seventh Circuit would alone justify review by this Court, the decision below adopts a construction of the FWPCA and of this Court's precedents which would produce a parochial patchwork of conflicting multi-state regulation of interstate waters. Given that the forty-eight contiguous states have borders contiguous with interstate bodies of water, the issue over which the Second and Seventh Circuits differ will recur frequently, with serious implications. Because of the importance of the issue and the likelihood of its recurrence, a definitive resolution by this Court is needed.

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* While this single-mindedness of approach is likely to be particularly strong for juries in a downstream state considering claims that an industry in an upstream state has polluted its waters, such a mind-set may influence local judges as well.

A. The Decision Below Is in Direct Conflict with the Decision on the Identical Issue by the Court of Appeals for the Seventh Circuit in *Milwaukee III*

1. *The Decision of the Seventh Circuit in Milwaukee III*

As the courts below recognized, their holding is flatly contrary to the holding of the Seventh Circuit in *Milwaukee III*, which represented the culmination of a legal controversy relating to the alleged pollution of Lake Michigan. In *Milwaukee I*, this Court denied Illinois leave to bring suit against the City of Milwaukee under the original jurisdiction of the Supreme Court but held that Illinois could sue in a district court where "federal common law and not the varying common law of the individual states . . ." would control because of "an overriding federal interest in the need for a uniform rule of decision . . ." in the regulation of interstate water discharges. 406 U.S. at 105 n.6 & 107 n.9.

The State of Illinois subsequently sought relief under both federal and state common law and under state statutes in the United States District Court in Illinois, which held that it had jurisdiction over both the federal and state claims in plaintiff's complaint, and granted relief. The Seventh Circuit affirmed the relief but held, in reliance upon *Milwaukee I*, that "it is federal common law and not state statutory or common law that controls in this case . . . and therefore we do not address the state law claims" decided by the District Court. *Illinois* v. *Milwaukee*, 599 F.2d 151, 177 n.53 (7th Cir. 1979). Although Congress had substantially amended the FWPCA in 1972, the Seventh Circuit held that the federal common law recognized in *Milwaukee I* had not been "preempted" by the 1972 amendments.

This Court granted Milwaukee's petition for certiorari, 445 U.S. 926 (1981), "to consider the effect of [the 1972]

legislation on the previously recognized [federal common law] cause of action." 451 U.S. 304, 308 (1981). This Court concluded in *Milwaukee II* that, by the 1972 amendments to the FWPCA, Congress had "occupied the field" of the regulation of discharges into interstate waters, thereby withdrawing from the federal courts the authority to fashion federal common law to resolve disputes over such discharges. 451 U.S. at 317. The judgment of the Seventh Circuit accordingly was vacated and the case remanded for further proceedings.*

Before the Seventh Circuit, plaintiffs again urged that under the FWPCA they could bring an action based upon Illinois law in Illinois courts against out-of-state dischargers.

In an opinion squarely at odds with the holding below, the Seventh Circuit rejected the plaintiffs' argument. Addressing first the precedents of this Court, the Seventh Circuit explained that such decisions as *Milwaukee I* and *II*, *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) and *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981), established that the "claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing users." 731 F.2d at 410-11. Thus, the Court held that federal law must control unless Congress, in the FWPCA, authorized resort to some state law.

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*The State of Illinois also filed a petition for certiorari presenting the question *inter alia* whether the Court of Appeals erred in not addressing the State's state law claims. This Court noted in *Milwaukee II* that Illinois had raised the issue whether state law was *also* available, see 451 U.S. at 310 n.4; however, it ultimately denied Illinois's petition. 451 U.S. 982 (1981).

The Seventh Circuit detailed the extensive provisions in the FWPCA that ensure "protection of the interest of a state whose waters may be affected even though the discharges under consideration occur in a different state." 731 F.2d at 412. *See, e.g.*, § 1341(a)(2) (requiring the Administrator to notify a state that might be affected by a discharge authorized by a permit and providing the objecting state a hearing); § 1342(b) (requiring that a state permit program ensure to any state whose waters might be affected by a discharge notice, an opportunity for a public hearing and the right to submit recommendations, notice of rejection of which must be forwarded to the Administrator who is empowered to prevent issuance of the permit). The court also pointed out that a suit to enforce permit limitations could only be brought "in the judicial district in which the source is located." (§ 1365 (c)).

The Seventh Circuit then turned to an analysis of the "savings clauses" of the FWPCA. It observed that there were two provisions that might permit an action to be brought in one state under its laws against a discharger in another state, sections 1370 and 1365. Section 1370(1) provides that nothing in the FWPCA shall prevent any state from adopting and enforcing a discharge limitation, provided such limitation or standard is not less stringent than those set forth in the FWPCA. The Court of Appeals concluded that, given the emphasis of the FWPCA on the "role of the state where the discharge in question occurs" and "the conflict and confusion which could result from any different construction," § 1370(1) must be limited to state-imposed limitations "with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state." 731 F.2d at 413.

Section 1370(2) provides in pertinent part that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." Again referring to the structure of the FWPCA and the "conflict and confusion" that would result from a contrary interpretation, the court reasoned that in this provision "Congress intended no more than to save the right and jurisdiction of a state to regulate activity *occurring within* the confines of its own boundary water." *Id.* (footnote omitted; emphasis added).

Finally, the court addressed the scope of § 1365(e) which, in addition to limiting suits for enforcement of permit limits to be brought only in the federal judicial district in which the discharge *source* is located, provides that,

> "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ."

The Seventh Circuit construed this provision as preserving a state's (or an individual's) traditional remedy to bring a nuisance action against a discharger in the courts of the state ("State I") whence the discharge came, under the laws of that state. *E.g., Askew* v. *American Waterways Operators,* 411 U.S. 325 (1973). But, the court found it "implausible that Congress meant to confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in [or from] State I by applying the statutes or common law of State II." 731 F.2d at 414. If the so-called "savings clause" were so read, the court observed, the "uniformity and state cooperation envisioned by the Act" would be undermined. *Id.* Additionally, it said,

> "[f]or a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontations between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the [FWPCA] would be rendered meaningless."

Id. The court concluded that "the reference in § 1365(e) to statute or common law, like the reference to right or jurisdiction of a state in § 1370, is to a statute or the common law of the state in which the discharge occurs." *Id.* (footnote omitted).

On Illinois' petition for rehearing, the court rejected the State's request to proceed in federal district court in Illinois. The court amended its earlier opinion to clarify that *only* the courts of the discharger's state have jurisdiction over interstate water discharge disputes.* The Illinois interests petitioned for certiorari to review the Seventh Circuit's decision. Before acting on the petition, this Court solicited the views of the United States, especially on the issue of available state law remedies in interstate water discharge cases. The Solicitor General urged that the petition be denied on the grounds that the Seventh Circuit's decision did not conflict with that of any other Court of Appeals and was a correct interpretation of the FWPCA and this Court's

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* "Nothing in our decision precludes the application of Wisconsin or Indiana law by state or federal courts *in one of those states* at the suit of out-of-state parties affected by discharges in that state." *Illinois* v. *Milwaukee,* Nos. 77-2246 & 81-2236, slip op. at 4 (7th Cir. May 29, 1984) (emphasis added).

decisions in *Milwaukee I* and *Milwaukee II*.* This Court denied the petition for certiorari. *Scott* v. *City of Hammond,* 105 S. Ct. 979 (1985).

2. *The Conflicting Decision of the Second Circuit*

While the Vermont district court and the Second Circuit agreed with the Seventh Circuit that, after *Milwaukee I* and *Milwaukee II,* attempts by one state to halt or limit dis-

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* The Solicitor General observed that *Milwaukee I* "left no doubt that the law of one state could not be relied upon to abate a discharge in another state." Brief for the United States as *Amicus Curiae* in *Milwaukee III* at 7 (JA 206). While *Milwaukee II* did not specifically address the question whether state law could be invoked to limit discharges in a second state, the Solicitor General urged that that "opinion lends no support . . . to the contention that such state law remedies were revived by the decision in *Milwaukee II,* and, indeed, the discussion there strongly suggests that such remedies are not available." Brief for the United States at 8 (JA 207).

After passage of the more comprehensive FWPCA, he concluded, the reasons underlying the Court's decision in *Milwaukee I* that federal law, not state law, applies in interstate water disputes "appear considerably stronger." *Id.* at 11 (JA 210). The Act:

> "creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. The federal government establishes threshold pollution control requirements (see, e.g., 33 U.S.C. 1311, 1312, 1316, 1317), subject to state decisions to 'adopt more stringent limitations through state administrative processes, [or] establish such limitations through state nuisance law, and apply them to *in-state* dischargers. *Milwaukee II,* 451 U.S. at 328 (emphasis added). Under this partnership, the states must defer to the federal government's choice of minimum national requirements, but they reserve the unqualified power to determine to what degree they wish to impose more stringent limitations within their borders. *If, as Illinois argues, one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed.*" *Id.* at 10 (JA 209) (emphasis added).

Petitioner apprised both the District Court in Vermont and the Second Circuit of the position taken by the United States and provided both Courts with a copy of the Solicitor General's brief. (JA 196-213)

charges from another state "implicate uniquely federal concerns" and that absent congressional authorization "state law . . . cannot control interstate water pollution controversies," they acknowledged that they differed with the Seventh Circuit over "the extent to which Congress authorized resort to state law in the FWPCA". 602 F. Supp. at 268 (A11). Contrary to the Seventh Circuit, the courts below held that §§ 1365(c) and 1370—the savings and state authority provisions, respectively—do "authorize[ ] actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred" and in the forums of that state. *Id.* at 274 (A25).

The linchpin of the holding that the FWPCA authorizes a state or its residents to bring an action in their courts under their state's laws against an out-of-state discharger is the view that Congress must have believed such an action was available at the time the FWPCA was under consideration in the Congress. The Vermont district court concluded that at the time the FWPCA was being "framed", *i.e.,* drafted and debated, Congress must have believed state law, not federal common law, controlled in disputes over interstate waters. Given this view, the court found it "completely reasonable to assume that Congress believed that a plaintiff suffering in State A might sue under the laws of State A to recover for injuries sustained as the result of pollution emanating from State B." *Id.* at 270 (A15). To the courts below, it was "inescapable that Congress, by passage of the FWPCA's saving clause and state authority provisions, intended to preserve just such an action." *Id.* (A15).

This determination in turn was predicated on the twofold basis that this Court did not decide *Milwaukee I* until after the FWPCA was drafted and debated, and the suggestion in *dicta* in this Court's then recent decision in

Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498-99 n.3 (1971), that state law would govern an interstate water dispute. Since § 1365(e) of the Act provides that "nothing in this section shall restrict any right which any person . . . may have under any statute or common law . . . to seek any other relief," the court below reasoned that Congress must have "intended" to preserve the kind of action brought by Vermont and its residents in this case. *Id.* (A15).

B. The Position of the Vermont District Court and of the Second Circuit Misconceives the Effect of this Court's Decisions and Misconstrues the Federal Water Pollution Control Act

This reasoning and, consequently, the courts' decisions are flawed in a number of respects.

Determining Congress' intent at some unspecified point during the lengthy gestation period of any statute, let alone the FWPCA, leads only to controversy and confusion as to what each individual legislator thought the law was during the varying stages of the statute's creation. There is nothing in the legislative history of the Act to support the courts' assumption that Congress viewed *Wyandotte* as representing the "state of the law." Moreover, even the assertion that Congress must have thought that *Wyandotte* represented the "state of the law" before it was overruled is open to serious question because this Court in *Hinderlider* v. *La-Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), had made it clear that state law did *not* apply to interstate water disputes. More important, *Milwaukee I* expressly overruled the cited *Wyandotte* footnote six months *before* final passage of the FWPCA and held explicitly that federal law, not state law, controlled such disputes. *See* 406 U.S. at 102 and n.3. *Milwaukee I* was decided on April 24, 1972; the FWPCA was enacted by Congress on October 18, 1972. During that time, the

Senate and House conference committee thoroughly debated the Senate and House versions of the bill, ultimately issuing a conference report; the House and Senate then debated and enacted the conference bill. Even if one selects the period of the statute's creation as the temporal context for the phrase in § 1365(e) "may have", a suggestion that Congress "relied on" *Wyandotte* and was unaware of *Milwaukee I* is so speculative that it cannot be a reliable guide to Congressional intent.

The courts below relied heavily on this Court's observation in *Milwaukee II*, 451 U.S. at 327 n.19, that, since *Ohio* v. *Wyandotte* remained extant during much of the "legislative activity" leading up to the Act, Congress could not have intended to preserve a federal common law remedy. 602 F. Supp. at 270 (A14). But this hardly justifies the conclusion that Congress *did* intend to revive a particular state law remedy by § 1365(e); in fact, this Court has made plain its view that any such intention was unlikely:

> "The fact that the language of § 1365(e) is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation, see n.21, *supra*, indicates that *it does not reflect any considered judgment about what other remedies were previously available* or continue to be available under any particular statute." 451 U.S. at 329 n.22 (emphasis supplied).

If one looks to the date that the FWPCA was passed in order to determine the effect of § 1365(e), the savings clauses relied upon by the courts below to support their holding could not have "saved" the state common law remedy alluded to in *Wyandotte* because that case had been overruled and, therefore, no state claim existed, at least one of the nature envisaged by the courts below. As re-

cently as 1981, this Court itself in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 and n.13 (1981), reaffirmed that state law could not govern interstate water disputes, citing *Milwaukee I* with approval. And § 1370, according not only to *Milwaukee III* but to *Milwaukee II*, applies only to state regulation of in-state discharges. 451 U.S. at 327-28.

The courts below sought to bolster the credibility of their interpretation of the FWPCA by emphasizing what they perceived as other flaws in the Seventh Circuit's contrary analysis. But, their analysis does not withstand close examination.

The courts below were of the view, for instance, that the Seventh Circuit's ruling deviated from the choice of law principles laid down by this Court in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), which require a federal court sitting in a diversity case to apply the choice of law principles of the forum state. 602 F. Supp. at 270 (A16). As the United States stated in its amicus brief in *Milwaukee III*:

> "This case is not an ordinary tort suit; it involves the question of pollution of interstate waters which this court repeatedly has held to require special treatment. There is not presented a choice-of-law question in the sense considered in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Rather, it is clear that federal law governs (see *Milwaukee I*, 406 U.S. at 105 & n.7; *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)), and state law is preempted to the extent required by federal law." Brief for the United States at 13 n.12 (JA 212).

In an attempt to distinguish *Milwaukee III*, the courts below assigned weight to the fact that this case involved

only private parties seeking application of nuisance law that was "not [intended] to regulate the activity of neighboring states. . . ." 602 F. Supp. at 271 (A19). As such, the courts considered the respondents' nuisance claim for substantial damages and injunctive relief to pose at most only a "purely incidental" intrusion upon the sovereignty of the discharger's state, *id.* at 271 (A19), which "merely supplement[s] the standards and limitations imposed by the Act." *Id.* (A17).

This Court has consistently ruled that federal law governs interstate water disputes regardless of the nature of the parties. *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co., supra.* Similarly, in *Milwaukee I* the Court expressly stated that its holding that federal law governed interstate water pollution disputes was not limited to governmental bodies:

> "Thus, it is not only the character of the parties that requires us to apply federal law. *See Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237. . . . As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 421-427, where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." 406 U.S. at 105 n.6.

See also, Texas Industries, Inc. v. *Radcliff Materials, Inc., supra,* 451 U.S. at 641 n.13; *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 421-27 (1964).*

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* The Second Circuit's analysis conflicts with decisions in courts in the Third as well as the Seventh Circuits which have held that federal law applies in interstate water disputes even if the litigators are both private parties. *See National Sea Clammers Ass'n* v. *City of*

(footnote continued on following page)

Moreover, contrary to the suggestion of the courts below, the relief sought here—more than a hundred million dollars and injunctive relief which would, at the least, cause the reconstruction of a mill which is the largest employer in one of New York State's most economically depressed counties—cannot fairly be described as an "incidental intrusion" upon the sovereignty of New York. Nor can it be justified as a "mere supplement" to the FWPCA. If a lay jury in State B (let alone States C, D, E) could "supplement" the control of the EPA and State A over a given discharger by imposing through nuisance law new and possibly infeasible treatment requirements, either in the form of equitable relief or damage awards which will require process changes to avert future awards, the discharger would be subjected endlessly to increased expenses, operational disruption, perhaps even termination, and the FWPCA permitting process would be seriously undermined. Such a result is particularly unjustified where State B (such as Vermont) has taken the

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(footnote continued from preceding page)

New York, 616 F.2d 1222, 1233 (3d Cir. 1980) ("the common law nuisance remedy recognized in *Illinois* v. *City of Milwaukee* is available in suits by private parties"), *vacated and remanded on other grounds sub nom. Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Evansville* v. *Kentucky Liquid Recycling Inc.*, 604 F.2d 1008, 1018-19 (7th Cir. 1979) (court cited *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co., supra*, to support its ruling that a municipal corporation could bring a federal common law action against a private defendant), *cert. denied sub nom. Louisville & Jefferson County Metropolitan Sewer District* v. *Evansville*, 444 U.S. 1025 (1980). A district court in New York has also reached a contrary result. *Byram River* v. *Village of Port Chester*, 394 F. Supp. 618, 622 (S.D.N.Y. 1975) (federal common law action brought by a private environmental organization and an individual). *See also*, McMahon, *The New Federal Common Law*, 13 For the Defense 83, 84 (1972); Note, *Environmental Law: Cause of Action Under Federal Common Law for Pollution of Interstate Waters*, 77 Dick L. Rev. 451, 456 (1973); Note, *Jurisdiction: Federal Common Law Under 1331(a)*, 52 Neb. L. Rev. 301, 305 (1973).

opportunity granted by the FWPCA to object to and participate in the issuance of a permit. Vermont agreed to (and even proposed certain of) the stringent limits in petitioner's permit that are now challenged by respondents as causing a nuisance.

Finally, the courts below rested their decision in part upon the conclusion that the FWPCA implicitly overruled *Milwaukee I*:

> "the Court [in *Milwaukee I*] also *implicitly assumed* that the discharge of pollutants, like the appropriation of water for personal consumption or reclamation, was simply another competing use of a limited resource . . . Since that opinion Congress, by the passage of the FWPCA, has expressly altered the assumptions on which *Milwaukee I* was based: although pollution is a competing use for interstate waters, it may no longer be considered a *legitimate competing* use." 602 F. Supp. at 272 (A19) (emphasis supplied).

This suggestion is simply irreconcilable with this Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc., supra.* In *Texas Industries*, decided well after passage of the FWPCA, the Court cited *Milwaukee I* with approval for the principle that:

> ". . . federal common law exists only in such narrow areas as . . . interstate and international disputes implicating the conflicting rights of States . . . . In these instances, our federal system does not permit the controversy to be resolved under state law . . . because the interstate or international nature of the controversy makes it inappropriate for state law to control.
>
> . . .

> See, e.g., *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) . . . . Many of these cases arise from interstate water disputes. Such cases do not directly involve state boundaries, disputes over which more often come to this Court under our original jurisdiction; they nonetheless involve especial federal concerns to which federal common law applies." 451 U.S. at 641 & 641 n.12.

In essence, the courts below took the position that a discharge in compliance with a NPDES permit is an illegitimate use of a waterway. Petitioner does not contend, and *Milwaukee III* did not hold, that an unregulated discharge of raw pollutants into a "limited resource" was "legitimate." The case held, and the statute recognizes, simply that a careful balance must be struck among the competing potential uses of interstate waters and that the striking of that balance is a matter of federal law (through the permitting process) as supplemented by the laws of the state where the discharge occurs. Any other view would render meaningless the entire FWPCA system.

C. The Issue Over Which the Seventh Circuit and Second Circuit Courts of Appeal Differ is Substantial and Will Arise Frequently

The Second and Seventh Circuits fundamentally disagree over whether a major federal statute—the Federal Water Pollution Control Act—permits suits in one state under its laws against an entity discharging effluents into interstate waters from another state. As the decisional law now stands, in the Second Circuit, a state or its citizens may sue in their courts for alleged injury from effluents discharged from other states, while in the Seventh Circuit, nuisance actions alleging injury from effluent discharges into interstate waters can only be brought in the state in which the discharger is located, and under the laws of that state.

The rulings below will have particularly pernicious consequences where an interstate body of water touches on several states—for example, the Mississippi River, which is bordered by ten states. Under the holding of the courts below, a suit for alleged pollution of that river could be brought in multiple courts under ten different states' nuisance laws. This would inevitably result in chaos for dischargers and sharp confrontations among states over the paramount authority to regulate a discharger. These results are directly contrary to the underlying regulatory purposes of the FWPCA: to promote consistency of discharge standards and state cooperation, and to vest paramount authority over a discharger in the federal government and the discharger's home state.

Standing alone, these actual and prospective conflicts over the proper interpretation of a major federal statute warrant this Court's consideration. And there is no reason to believe that the need for resolution by the Court will subside. The existing conflict between the Second and Seventh Circuits is not likely to resolve itself, particularly given that the Vermont district court awaited the decision from the Seventh Circuit, and then expressly rejected both the analysis and the holding of that court. Moreover, since the forty-eight contiguous states have borders contiguous with bodies of interstate waters, the issue is likely to recur frequently. In fact, the question has already arisen in an intermediate state court, *Tennessee* v. *Champion International Corp.*, 22 Env't. Rep. Cas. (BNA) 1338 (Tenn. Ct. App. 1985), *appeal granted* (Tenn. S. Ct. 1985). The Tennessee Court of Appeals held, expressly contrary to the Seventh Circuit, that an interstate water pollution action could be brought under Tennessee law in a Tennessee court against a discharger located in North Carolina. This case is currently pending before the Tennessee Supreme Court.

These are not the kinds of benign conflicts that should go unresolved, because the immediate repercussions are significant. For example, the consequences of the Second Circuit's decision for industries such as petitioner's which operate pursuant to effluent discharge standards, may be serious, if not paralyzing. If the courts below are correct, such dischargers must not only satisfy the standards mandated by the FWPCA, they must also comply with statutory and common law limits which may be defined in every state whose borders touch the body of water into which the discharges are made. Common law nuisance standards are based upon "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *Milwaukee II*, 451 U.S. at 312. As a result, as the Seventh Circuit recognized, it will be "virtually impossible" to predict what would constitute a lawful discharge. *Milwaukee III*, 731 F.2d at 414.

Moreover, this uncertainty and confusion will exist for petitioner, and others similarly situated, despite compliance with their permits issued under the Federal Water Pollution Control Act by the Environmental Protection Agency or the qualified state agencies. Petitioner's mill, for instance, has been the subject of extensive regulation pursuant to a 1974 settlement agreement among New York, Vermont, the EPA and petitioner and to the FWPCA permitting process. The 1974 Settlement Agreement terminated a lawsuit brought in 1970 by the State of Vermont in this Court against New York and petitioner, which alleged, *inter alia*, that discharges into the air and water from petitioner's plant constituted a nuisance (JA 119). *See Vermont* v. *New York*, 406 U.S. 186 (1972); *see also*, *Vermont* v. *New York*, 417 U.S. 270 (1974).

Contemporaneous with the 1974 Settlement Agreement, the EPA issued to the petitioner's mill a draft NPDES

permit pursuant to the FWPCA. That draft permit incorporated the discharge standards contained in the 1974 Settlement Agreement as well as additional requirements (JA 47). Pursuant to Sections 1319 and 1342 of the FWPCA, the EPA sent notice of the draft permit to the State of Vermont as an "affected state." Officials of Vermont as well as representatives of The Lake Champlain Committee (the principal private environmental organization in the Champlain Valley) participated in all subsequent negotiations among the EPA, New York and petitioner. (JA 48). The parties eventually reached complete agreement and the EPA issued a final NPDES permit for petitioner's mill on March 17, 1977 (JA 52). Petitioner installed a $3,000,000 addition to its waste water treatment system to achieve compliance with certain of the permit requirements.

Petitioner's permit is one of the most stringent in the country and contains detailed limits on nearly every component of the mill's discharge. Under the 1974 Settlement Agreement, petitioner makes detailed monthly reports on the performance of the waste water treatment system, including precise daily readings for numerous parameters, to New York, the EPA, and Vermont (JA 53).* If the decision below is allowed to stand, however, this federal permit and petitioner's compliance with it may well be irrelevant as petitioner will be subject to the statutory and common law of Vermont—one of the two states which helped formulate petitioner's permit.

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* On the basis of those reports and its own observations, the Environmental Conservation Agency of the State of Vermont stated in writing to the district court on September 23, 1981 that the "IPCo. discharge is currently well within the stringent permit limits . . . [and] . . . the effects of the present discharge on the Lake are minimal." (JA 183).

In short, the decision below destroys the balance of power between the federal government and the neighboring states established under the FWPCA and places petitioner, and others similarly situated, in the untenable position of being subject to regulation by the EPA, the state in which it is located, and to the potentially conflicting statutes, regulations and case law of all the states with borders contiguous with the interstate bodies of water into which its discharges are made.

CONCLUSION

The Court over the years has taken a keen interest in defining the framework within which interstate water pollution disputes are to be resolved. After passage of the "comprehensive" FWPCA, the remaining question relating to the interplay of state and federal law over such disputes is the extent, if any, to which the FWPCA authorizes states or their citizens to bring an action in their own courts under their own laws against an out-of-state discharger. The Court denied a writ of certiorari to review *Milwaukee III*, a case which could have served as a vehicle for resolution of this issue. However, at that time, as the Solicitor General pointed out, there was not a conflict on this issue in the Courts of Appeal. Such a conflict now exists, the Second Circuit having explicitly rejected the holding and analysis of the Seventh Circuit. Thus, there are two federal courts of appeal that have directly confronted and fully examined the issue. For the reasons stated, *see* discussion *supra* at 20-24, the issue is substantial and is likely to arise repeatedly. The holding of the court below subjects dischargers to the intolerable uncertainty of liability under a multitude of differing and possibly conflicting state nuisance laws in actions brought in different courts, undermining the state cooperation and uniformity contemplated in the FWPCA.

There is ample basis upon which to believe that such a result was not intended by the Congress, and that the court below simply misconstrued the applicable provisions of the Act. Petitioner submits that this case is in all respects an excellent vehicle for the Court to resolve the important federal question presented.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals
(November 4, 1985)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 201—August Term 1985

Argued: October 17, 1975 Decided: November 4, 1985

Docket No. 85-7506

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiffs-Appellees,

—against—

INTERNATIONAL PAPER COMPANY,

Defendant-Appellant.

Before:

KAUFMAN, PRATT, and MINER,

Circuit Judges.

Opinion of the Court of Appeals
(November 4, 1985)

SUSAN F. EATON, Middlebury, VT (Peter F. Langrock, Emily J. Joselson, Langrock Sperry Parker & Wool, Middlebury, VT; Smith, Harlow & Liccardi, Rutland, VT; Jeffrey L. Amestoy, Attorney General of the State of Vermont, Montpelier, VT, of Counsel), *for Plaintiffs-Appellees.*

JAMES W. B. BENKARD, New York, NY (Jamie Stern, John R. D'Angelo, Davis Polk & Wardwell, New York, NY; Dinse, Erdmann & Clapp, Burlington, VT, of Counsel), *for Defendant-Appellant.*

PER CURIAM:

By order dated February 5, 1985, the district court, Albert W. Coffrin, *Chief Judge,* denied defendant's motion pursuant to Fed. R. Civ. P. 12(c) and 56(b) to dismiss plaintiffs' cause of action concerning water pollution. *Ouellette* v. *International Paper Co.,* 602 F. Supp. 264 (D. Vt. 1985). The district court held (i) that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* authorizes this action involving interstate water pollution claims by owners of property in Vermont against an effluent producer located in New York to be maintained in the courts and under the common law of the State of Vermont, where the alleged injuries occurred; (ii) that neither the Two-Party Agreement nor the Four-Party Agreement entered into by the State of Vermont in settlement of *Vermont* v. *New York,* 419 U.S. 955 (1974), bars this suit; and (iii) that plaintiffs have alleged sufficient special damages to state a claim for nuisance.

Opinion of the Court of Appeals
(November 4, 1985)

We affirm the order appealed from, essentially for the reasons set forth in Chief Judge Coffrin's thorough opinion, which we adopt in all respects except one. Chief Judge Coffrin distinguished *Badgley* v. *City of New York,* 606 F.2d 358 (2d Cir. 1979), *cert. denied,* 447 U.S. 907 (1980), finding that the settlement contract at bar differed "in two important ways" from the settlement decree and compact there. *Ouellette,* 602 F. Supp. at 273-74. We view his second distinguishing reason, grounded in the scope, terms, and language of the respective agreements, and, particularly, the differences in their "saving clauses," to be sufficient to remove this case from the *Badgley* principle. We express no view on what weight, if any, should be given to the first distinguishing reason mentioned by Chief Judge Coffrin; that unlike the settlement order and compact in *Badgley,* the contractual resolution of the prior dispute here received neither congressional nor judicial approval.

Affirmed.

Opinion of the District Court
(February 5, 1985)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action File No. 78-163

HABMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs,

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY

Peter Langrock, Esq. and
Attorney Susan Eaton,
Langrock, Sperry, Parker & Wool,
Middlebury, Vermont, for
Plaintiffs, and

John Chase, Esq.,
Assistant Attorney General,
State of Vermont,
Montpelier, Vermont,
for Plaintiff Class Member,
State of Vermont,

Opinion of the District Court
(February 5, 1985)

James Benkard, Esq. and
Attorney Jamie Stern,
Davis, Polk & Wardwell,
New York, New York, and

Austin Hart, Esq.,
Dinse, Erdmann & Clapp,
Burlington, Vermont,
for Defendant,
International Paper Company

COFFRIN, Chief Judge

Having dealt with the defendant's objection to class certification in two previous opinions,[1] we are now presented with defendant's motion to dismiss plaintiffs' cause of action concerning water pollution pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure. Although defendant's motion was filed on June 22, 1981, the parties agreed (upon suggestion by the court) to await the Seventh Circuit's decision in the litigation brought by the State of Illinois and an Illinois resident against cities in Wisconsin and Indiana for pollution of Lake Michigan. That decision has now been rendered, *Illinois* v. *City of Milwaukee,* 731 F.2d 403 (7th Cir. 1984) (hereafter, "*Milwaukee 7th Cir.*"), *cert. denied sub nom. Scott* v. *City of Hammond,* 53 U.S.L.W. 3526 (U.S. Jan. 21, 1985), and, as anticipated, has illuminated many of the important issues raised by defendant's motion. Nevertheless, we depart somewhat from the conclusions drawn by the Seventh Circuit and, for the reasons below, deny defendant's motion to dismiss.

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[1] *Ouellette* v. *International Paper Co.,* 86 F.R.D. 476 (D. Vt. 1980); *Ouellette* v. *International Paper Co.,* No. 78-163 (D. Vt. Oct. 29, 1982).

BACKGROUND

As certified in our opinion of October 29, 1982, plaintiff class consists of the State of Vermont as well as of various Vermont residents owning property in Vermont on or near the "South Lake" area of Lake Champlain. Defendant, a New York corporation, operates a paper mill near Ticonderoga, New York, on the shore roughly opposite plaintiffs' property. In their complaint, plaintiffs allege two "Causes of Action" within which they incorporate numerous counts. The "First Cause of Action," which defendant now seeks to dismiss, contains plaintiffs, various claims and theories related to the alleged pollution of Lake Champlain by defendant's Ticonderoga paper mill. The "Second Cause of Action," which relates to plaintiffs claims for air pollution, is not at issue here.

Plaintiffs claim that discharges from defendant's paper mill have fouled the waters around plaintiffs' properties —which are used primarily for residential purposes but also for farming and some businesses such as marinas— interfering with the use and enjoyment of the property and, consequently, diminishing its value. Count I alleges that discharges from defendant's mill into the waters of Lake Champlain constitute "a continuing nuisance;" Count II alleges that defendant has violated its National Pollutant Discharge Elimination System (NPDES) permit by discharging pollutants into Lake Champlain in excess of the amounts specified in the permit; Count III alleges that defendant's discharges constitute an unreasonable riparian use; and Count IV alleges that defendant's discharges were negligent. Plaintiffs seek money damages and an injunction ordering defendant to relocate its water intake system closer to the source of its waste discharge system.

Defendant responds (1) that its Ticonderoga paper mill has been operating pursuant to and in compliance with an NPDES permit, (2) that federal rather than state law controls disputes involving interstate water pollution, and (3) that Congress, in passing the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (FWPCA), occupied the field of water pollution abatement, thereby barring any claim brought under federal common law for interstate water pollution. Relying on *Milwaukee 7th Cir., supra,* defendant claims that if Congress intended to allow any state common law action for abatement of pollution of interstate waters, it also intended that such a suit must be brought in the courts and under the laws of the state *in which the discharge occurred.* Defendant alternatively asserts that plaintiffs' rights as riparian owners have been resolved in prior proceedings. Finally, defendant alleges that even if plaintiffs were entitled to bring a state common law action grounded in nuisance, plaintiffs' failure to allege an injury different in nature from that suffered by the public in general deprives them of a cause of action for nuisance.

DISCUSSION

I. State Common Law and Interstate Water Pollution Disputes

A. *Illinois* v. *City of Milwaukee*

Because the issues in the case are similar to those which have arisen during the course of attempts by Illinois to control pollution of Lake Michigan emanating from various cities located outside of Illinois, we briefly recount the several opinions involved in the litigation reflecting these attempts.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*) Illinois sought leave to file a bill of complaint under the Supreme Court's original jurisdiction against various Wisconsin cities and sewerage authorities. Illinois alleged that discharges of untreated sewage into Lake Michigan constituted a public nuisance. The Court, in denying Illinois leave to invoke its original jurisdiction, held that the federal common law of nuisance governed the dispute. *Id.* at 105 ("The question of apportionment of interstate waters is a question of "federal common law" upon which state statutes or decisions are not conclusive.") Although the Court held that, at the time of its decision, federal common law provided the basis for resolution of interstate water pollution disputes, it also recognized that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Id.* at 107.

Illinois promptly brought suit in the United States District Court for the Northern District of Illinois alleging, *inter alia*, that discharge of sewage into Lake Michigan by the Wisconsin cities created a public nuisance under both federal and Illinois common law and that it violated Illinois statutes. After a trial, the district court found for plaintiffs and granted injunctive relief mandating changes in defendant's sewage system. The Seventh Circuit affirmed but concluded that "it is federal common law and not State statutory or common law that controls in this case." *Milwaukee 7th Cir.*, 599 F.2d at 177 n.53.

Upon granting Milwaukee's petition for *certiorari* from that decision, the Supreme Court concluded that, with the passage of the 1972 Amendments to the FWPCA, Congress had since occupied the field of water pollution control by establishing a comprehensive regulatory program supervised

by an expert administrative agency. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*). In so doing, Congress had supplanted any federal common law action for nuisance.[2]

On remand, Illinois again pressed its claim for injunctive relief, this time on the basis of Illinois law. In a similar action, Illinois and a resident of Illinois, a Mr. W. Scott, brought separate suits against the City of Hammond, Indiana, for pollution of Lake Michigan, alleging violations of Illinois statutory and common law. The suit was brought originally in Illinois state court but was later removed to the United States District Court for the Northern District of Illinois. Motion to remand the case to state court was denied. *Illinois* v. *Secretary, District of Hammond*, 498 F. Supp. 166 (N.D. Ill. 1980).

After Illinois prevailed over Milwaukee at trial, and the district court in the suit against the City of Hammond denied a motion by defendants to dismiss Illinois' state law claims,[3] *Scott* v. *City of Hammond*, 519 F. Supp. 292, 298 (N.D. Ill. 1981), the Seventh Circuit consolidated the two cases and considered the availability of a state law action seeking injunctive relief for the alleged creation of a public nuisance in interstate waters. Relying primarily on the Supreme Court's decision in *Milwaukee I*, the Seventh Circuit held that pollution of interstate waters is a "controversy

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[2] Illinois had also applied for *certiorari*, asserting that the Seventh Circuit erred in disregarding claims made by Illinois under Illinois' statutory and common law. Yet the Supreme Court in *Milwaukee II* specifically declined to pass on this question since it was the subject of Illinois' petition and not Milwaukee's. *Milwaukee II*, 451 U.S. at 310 n.4. The Court subsequently denied Illinois' petition. 451 U.S. 982 (1981).

[3] The district court certified its ruling for an interlocutory appeal under 28 U.S.C. § 1292(b).

of federal dimensions, implicating the conflicting rights of states and inappropriate for state law resolution." *Milwaukee 7th Cir.*, 731 F.2d at 410. The only role for state law in such disputes, according to the Seventh Circuit, was that which was specifically authorized by the 1972 FWPCA, the governing federal law. Reviewing the FWPCA, the Seventh Circuit concluded that, despite the language of 33 U.S.C. § 1370(2) (the "state authority" provision), Congress had provided no authority for one state (State A) or its citizens to use its *own* common or statutory law as a means to halt pollution discharged from facilities located in another state (State B). The court, however, did express its belief that Congress had authorized suits by State A or its citizens *in the courts of and under the laws of State B.* Because Illinois had brought suit in its own courts and used its own law, the consolidated cases were remanded for dismissal. On January 21, 1985, the Supreme Court denied plaintiff's petition for a writ of *certiorari, Scott* v. *City of Hammond,* 53 U.S.L.W. 3526 (U.S. Jan. 21, 1985), thus terminating that litigation.

Understandably, defendant in this case urges that we adopt the analysis and conclusions of the Seventh Circuit. *Milwaukee 7th Cir.* is an admirable attempt to deal with the difficult issues concerning the role of state law in controlling the pollution of interstate waters. It is clear that state law, in the absence of Congressional authorization, cannot control interstate water pollution controversies. *Milwaukee I* and *II* stand for the proposition that attempts by one state to halt discharge into interstate waters emanating from another state implicate uniquely federal concerns. When the issue is viewed as a problem of equitable apportionment—as it should be in the absence of a contrary expression by Congress—the competing and conflicting

interests of states and their citizens for limited quantities of interstate water mandate resort to federal law. The issue presented by the instant case, therefore, is not whether Congressional legislation *preempted* state statutory and common law as it relates to interstate water pollution since, according to *Milwaukee I*, federal law has *always* governed such disputes. Rather, the controlling question is the extent to which Congress authorized, either expressly or implicitly, resort to state common law in a situation such as this.

We differ from the Seventh Circuit in our perception of the extent to which Congress authorized resort to state law in the FWPCA. The Act creates a comprehensive regulatory scheme, the goal of which is to eliminate the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1). Despite extensive federal oversight, Congress' express policy was to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ." 33 U.S.C. § 1251(b). Commensurate with this policy, the role played by the states within the Act's framework is an important one: states are expressly empowered to adopt or enforce any point source or water quality limitation or standards stricter than the minimum levels imposed by the Act, 33 U.S.C. §§ 1370(1), 1311(b)(1)(C), and to administer their own enforcement programs. 33 U.S.C. § 1319.

In addition to the powers afforded the states within the regulatory scheme imposed by the Act, Congress included a "saving clause" providing that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. Furthermore, the "state authority" section of the Act, 33 U.S.C. § 1365(e), similarly states

that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." Plaintiffs contends that these two sections authorize the application of Vermont common law to remedy an injury caused by discharges of pollutants emanating from defendant's paper mill in New York. We agree.

There are, perhaps, three ways to interpret the saving clause and state authority provision of the Act in light of Supreme Court decisions. Note, *City of Milwaukee* v. *Illinois: The Demise of the Federal Common Law of Water Pollution*, 1382 Wis. L. Rev. 627, 664-71. The most restrictive interpretation would be that Congress intended to save state common law only as it applied to waters which are outside of the FWPCA's jurisdiction. Since as much as ninety to one hundred percent of the nation's waters fall within the definition of "navigable waters" (to which the Act applies), *id.* at 666., this view of the Act would render state law practically meaningless. Furthermore, under this interpretation of the Act, a person injured by pollution in "navigable water" would be unable to recover damages from the polluter since the Act does not provide a damage remedy for private actions. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 13-18 (1981). It is simply inconceivable that Congress intended to deprive a party injured by water pollution of all compensation for that injury. Such a result would be antithetical to the ends of the Act. It would also implicitly contradict Congressional intent as expressed in the Senate Report accompanying 33 U.S.C. § 1365(e):

> It should be noted, however, that this section would specifically preserve any rights or remedies under any other law. *Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.*

S. Rep. No. 92-414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3746-47 (emphasis added). That state law actions were preserved is clear; the question is the extent to which they were preserved.

A second possible interpretation of the saving clause and citizen suit provisions of the Act is that they preserve a state's nuisance law only as it applies to discharges emanating from within that state or its boundary waters. This is the position suggested in *Milwaukee 7th Cir.* Although we find this view more plausible than the first, more restrictive interpretation, there is simply nothing in the Act which suggests that Congress intended to impose such limitations on the use of state law. We therefore adopt the third possible interpretation—that the Act authorizes actions to redress injury caused by water pollution of interstate waters through the laws of the state in which the injury occurred. We now set forth our reasons for departing from *Milwaukee 7th Cir.*'s adoption of the second interpretation.

The Seventh Circuit—having concluded that, under *Milwaukee I*, state law remedies were inappropriate for the resolution of disputes such as that between Illinois and Milwaukee—reasoned that the saving clause could not preserve traditional state remedies since there was no right or juridiction to be saved. *Milwaukee 7th Cir.*, 731 F.2d at 413. The court held that "[I]n the light of the structure of FWPCA and the potential conflict and confusion, we think Congress intended no more than to save the right

and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters." *Id.* (footnote omitted).

Without any textual support in the Act, this conclusion appears to be *post hoc* speculation as to what Congress *would* have intended *had it known* at the time of the Act's creation that the Supreme Court, in *Milwaukee I*, would hold that federal common law preempted state common law. The legislative history reveals, however, that at the time the FWPCA was formulated, state law rather than federal common law was applicable to interstate pollution disputes. As the Supreme Court noted in *Milwaukee II*:

> It must be noted that the legislative activity resulting in the 1972 Amendments largely occurred prior to this Court's [1972] decision in *Illinois* v. *Milwaukee* [*Milwaukee I*]. Drafting, filing of Committee Reports, and debate in both Houses took place prior to the decision. Only conference activity occurred after. It is difficult to argue that particular provisions were designed to preserve a federal common law remedy not yet recognized by this Court.
>
> . . . During the legislative activity resulting in the 1972 Amendments, . . . this Court's decision in *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493 (1971), indicated that *state* common law would control a claim such as Illinois.' *Wyandotte*, like the present suit, was brought by a State to abate a pollution nuisance created by out of state defendants. The Court ruled that an "action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938)." *Id.*, at 498-99 n.3. The Court in [*Milwaukee I*] found it necessary to overrule this statement, see 406 U.S. at 102 n.3.

451 U.S. at 327 n.19.

The Court's opinion as to the applicability of state law, *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493, 500 (1971)—which involved a dispute among several states and Canada concerning pollution of Lake Erie—was simply an exppression of traditional tort law and choice of law principles existing at that time. The Supreme Court had previously summarized those principles in *Young* v. *Masci*, 289 U.S. 253 (1933):

> A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed by a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, for maintenance of a nuisance, for blasting operations, and for negligent manufacture.

Id. at 258-59 (citations omitted).

Given the state of the law during the time of the FWPCA's framing, it is completely reasonable to assume that Congress believed that a plaintiff suffering in State A might sue under the laws of State A to recover for injuries sustained as the result of pollution emanating from State B. It thus seems inescapable that Congress, by passage of the FWPCA's saving clause and state authority provisions, intended to preserve just such an action. In basing its decision

on an incompatibility of state and federal law not yet recognized by Congress at the time of FWPCA's creation; *Milwaukee 7th Cir.* thus imposed artificial limitations on the right to bring a state common law nuisance action.

The Seventh Circuit's position also creates a choice-of-law rule that deviates, without legislative authorization, from well-settled choice of law principles. *Milwaukee 7th Cir.* would, in settling disputes over interstate pollution, mandate that, where state law was sought to be applied, courts apply the law of the state from which the pollution emanates regardless of the states' choice-of-law principles. Yet the FWPCA provides no support for this deviation from the rule that, in a diversity case, a federal court must apply choice of law principles of the state in which the court sits. *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).[4]

Another factor weighing against the adoption of the position espoused in *Milwaukee 7th Cir.* is that the conclusions reached are logically inconsistent. The Seventh Circuit concluded that the saving clause contained in the FWPCA could not save Illinois' "right" to bring an action against Milwaukee under Illinois law since, according to *Milwaukee I*, there was no such right to be saved. *Milwaukee I*, however, did not distinguish between water pollution emanating from outside the forum state's boundary waters and that emanating from within. That decision simply held that state law was ill-suited to resolve any dispute between two states concerning the pollution of interstate waters. There is nothing in *Milwaukee I* to suggest that the Supreme Court

[4] *See also Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 4 (1975) ("A federal court is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.")

would have approved a suit by Illinois in the courts of and pursuant to the laws of Wisconsin. Using the Seventh Circuit's own analysis, then, the FWPCA did not save Illinois' right to sue in Wisconsin's courts under Wisconsin law since there was no such right to be saved. The Seventh Circuit nevertheless suggested that Congress, by inclusion of the saving clause, must have meant to save state law as it applied to in state discharges.

This inherently contradictory conclusion was apparently an attempt by the court to reconcile the express language of the saving clause and accompanying legislative history with the problems which the court believed would result from the application of state law in interstate water pollution disputes. In the situation presented here, however, nothing in the application of traditional common law remedies for nuisance would, as a practical matter, interfere with the objectives of the Act. In fact, the opposite is true. Congress, in passing the Act, sought "to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into navigable waters. S. Rep. 92-414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3678. To this end, states' imposition of compensatory damage awards and other equitable relief for injuries caused by discharges into interstate waters merely *supplement* the standards and limitations imposed by the Act.

Defendant's implied position is that application of state law principles might interfere with defendant's "right" to discharge under its NPDES permit. Yet there is no indication that Congress ever intended that the NPDES permit confer an absolute right to discharge to the extent allowed by the permit. Since compliance with the Act does not constitute a defense to a common law action for damages,

see S. Rep. 92-414, *supra,* Congress must have recognized that some uncertainty would result to discharges of pollutants. The goal of the FWPCA is not finality; rather, it is the elimination of the discharge of pollutants.

Finally, we disagree with the defendant's contention that application of state nuisance law in a situation such as this may lead to a "chaotic confrontation between sovereign states." Unlike *Milwaukee 7th Cir.*, the dispute here is between private parties. There is little or no possibility that this litigation will escalate into a conflict between different state entities.[5]

Even disregarding the nature of the parties involved, the common law action involved here does not directly implicate the regulatory powers of the states in which the parties are located. Plaintiffs have not attempted to impose legislatively defined standards or limitations on defendant. Plaintiffs seek compensatory damages, the purpose of which, of course, is to compensate parties for injuries or for interference with the use and enjoyment of their property. Such damages may have an indirect regulatory effect, yet the discharger remains free to operate so long as it pays for the injury it causes. *Cf. Silkwood* v. *Kerr-McGee Corp.*, 52 U.S.L.W. 4043, 4050 (U.S. Jan. 11, 1984) (Blackmun, J., dissenting) (alleged contamination from federally-licensed nuclear facility; compensatory damages awarded under state law complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme). Although an injunction to abate a nuisance has a direct impact on the polluter, it is designed primarily to

[5] Although the State of Vermont, as a riparian landowner, has been included in the plaintiff class, *see Ouellette* v. *International Paper Co.*, No. 78-163 (D. Vt. March 27, 1983), the State's actions are presumably controlled by the settlement agreements previously entered into with IPC. *See* Section II, *infra.*

redress a plaintiff's particular injury. In this respect, any intrusion on the sovereignty of the polluter's state is purely incidental. A state's nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare, and property rights of its own residents. The application of state law in this situation is no more intrusive on the sovereignty of foreign states than the application of one state's product liability law to a manufacturer located in another state. *See e.g. Watson* v. *Employers Liability Corp.*, 348 U.S. 66 (1954), *Bowles* v. *Zimmer Mfg. Co.*, 277 F.2d 868, 872-77 (7th Cir. 1960).

Congressional authorization of state law in a situation such as this does not necessarily contradict the rationale employed by *Milwaukee I.* There the Court—relying on case law applied to disputes over the apportionment of interstate waters—held that state law action was an inappropriate means to resolve interstate water pollution disputes. But the Court also implicitly assumed that the discharge of pollutants, like the appropriation of water for personal consumption or reclamation, was simply another competing use of a limited resource. Federal law was necessary to effect an equitable means of "dividing the pie," *see Milwaukee 7th Cir.* Since that opinion Congress, by the passage of the FWPCA, has expressly altered the assumptions on which *Milwaukee I* was based: although pollution is a competing use for interstate waters, it may no longer be considered a *legitimate* competing use. Thus it would appear that the Act has shifted the controlling issue from how to "divide the pie" to how best to eliminate the discharge of pollutants into the nation's waters. Consideration of the express language of the saving clause and state authority provision of the Act, the legislative history, and the state objectives of the Act inevitably lead one to the con-

clusion that Congress intended to authorize resort to state nuisance law in situations such as the instant one.

II. State Disposition of Plaintiffs' Riparian Rights

In 1970, the State of Vermont brought an action in the United States Supreme Court against the State of New York and IPC alleging, *inter alia,* that IPC's discharges into the air and water constituted a nuisance and a trespass. After the United States intervened, negotiations among the parties led to a consent decree which was ultimately rejected by the Supreme Court. *State of Vermont* v. *State of New York,* 417 U.S. 270 (1974). The parties then stipulated to a settlement that included the filing of a Motion to Dismiss without Prejudice. The complaint was dismissed by the Court on October 29, 1979. 419 U.S. 955 (1974). Although the settlement agreements were apparently filed with the Stipulated Motion to Dismiss, the terms of the settlement were never before the Court.

There are two Agreements of Settlement in this case: one between the State of Vermont and IPC, ("Two-Party Agreement"), the other between the State of Vermont, the State of New York, IPC and the United States ("Four-Party Agreement"). Both Agreements provide:

> This Agreement shall constitute a contract in settlement of No. 50, Original, but shall not constitute an adjudication or finding on any issue of fact or law, or evidence or admission by any party with respect to any such issue raised therein. In consideration of the mutual rights and obligations set forth, the following provisions are agreed to and accepted by the parties and shall be binding upon them respectively.

Both Agreements are thus purely contractual in nature. In exchange for certain concessions and money payments by IPC, the State of Vermont pledged, in both Agreements, not to

> seek to recover from any party to No. 50, Original damages for harm to the South Lake, its waters, shores, adjacent acres . . . allegedly suffered on or prior to the entry of an order dismissing the amended complaint in No. 50, Original for which the State of Vermont could have sought recovery in No. 50, Original.

¶ III(A)(2) of the Two-Party Agreement (the Four-Party Agreement contains a similar provisions at ¶ IV(A)(2)).

The State also agreed that, for a given time period, it would not support limitations more stringent than those contained in the Agreement. Yet the Agreements also contain the following clause:

> Nothing herein shall be construed as affecting any claims or rights of any citizens or residents of the State of Vermont that may exist againt any party to No. 50, Original.

¶ IV(F) of the Two-Party Agreement (the Four-Party Agreement contains a similar provision at ¶ VI(F)).

Defendant, relying on *Badgley* v. *City of New York,* 606 F.2d 358 (2d Cir. 1979), contends that the plaintiffs here are bound by the state's covenant not to sue contained in the Agreements. According to defendant, individual Vermont landowners were represented by the State of Vermont, and their riparian rights were fully adjudicated and settled under the terms of the Agreements. Plaintiffs' water pollution claim, defendant reasons, should therefore be dismissed. We disagree.

In *Badgley*, owners of riparian land situated in Pennsylvania claimed that diversion, impoundment and manipulation of the headwaters of the Delaware River by the City of New York had caused a diminution of the value of their lands. The City countered that its conduct was authorized by the Supreme Court's equitable apportionment of the Delaware River's waters. *See New Jersey* v. *New York*, 347 U.S. 995 (1954).

After a trial which resulted in a damage award for plaintiffs, the Second Circuit considered whether or not the district court had erred in holding that common law riparian rights in streams are not destroyed or altered when those streams have been apportioned by a Supreme Court decree involving the common law doctrine of equitable apportionment. The court concluded that Pennsylvania—as a party to a consent decree entered by the Supreme Court setting forth the rights of the riparian states along the Delaware, *New Jersey* v. *New York*, *supra*, and as a signer of the Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961), had represented the rights of all its citizens. The terms of the decree and the compact were thus held conclusive upon all Pennsylvania residents and bound their rights. *Badgley*, 606 F.2d at 364.

A review of the Two- and Four-Party Agreements in the instant case, however, show that the settlement contracts to which the State of Vermont was a party differ in two important ways from the decree and compact to which Pennsylvania was a party.

First, a significant factor in *Badgley* was that an award of damages to plaintiffs in that case might have "hobble[d] or possibly even destroy[ed] the effect of Supreme Court decrees of Congressionally approved interstate water compacts,' *Id.* at 366. Here, however, although the settlement

agreement resolved a dispute subject to the Supreme Court's original jurisdiction, the Two- and Four-Party Agreements had received neither Supreme Court nor Congressional approval. By their express terms, the Agreements purport to be a contractual resolution of the controversy involving only the signing parties.

Second, and perhaps more important, the Delaware River decree and compact established "a *comprehensive* scheme of river regulation, all-inclusive as to all matters concerning the manipulation of the law of the undiverted portion of the Delaware River." *Id.*, 606 F.2d at 368 (emphasis added). In contrast, it appears from the Agreements in this case that the State of Vermont did not agree to a comprehensive allocation of discharge rights in the South Lake area but only to forbear from bringing suit against IPC or from proposing stricter limitations or conditions so long as IPC adhered to the limitations and conditions set forth.[6] The "saving clause" included in both Agreements confirms this construction of the Agreements. Unlike the "saving clause" at issue in *Badgley*,[7] the clause contained in the

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[6] Moreover, the Agreements applied only as to harm suffered on or prior to October 29, 1974, the date of the Supreme Court's Order of Dismissal, reported at 419 U.S. 955. *See, e.g.*, ¶ III(A)(2) of the Two-Party Agreement, quoted *supra*, and ¶ IV(A)(2) of the Four-Party Agreement. Thus, even if we were to hold that the rights of private individuals within Vermont to bring this action extended no further than that of the state itself, we would still allow recovery for harm which occurred after that date.

[7] The "saving clause" in the Delaware River Basin Compact addressed by the court in *Badgley* provided: "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory position relating to riparian rights." *Id.*, 606 F.2d at 371. Not only is this not as specific as the clause in the instant case, but the court held that it was inconsistent with other clauses within the same compacts. *Id.*

Two-Party Agreement ***specifically preserves any claims and rights of Vermont citizens and residents*** that may exist against any party to the Supreme Court proceeding. Only the most tortured construction of this clause would prevent Vermont residents from recovering for injuries sustained as a result of pollution emanating from IPC's mill.[8]

It seems clear that the State of Vermont bargained for a reduction of effluents in return for a limited covenant not to file suit itself—nothing more. The State of Vermont did not, therefore, dispose of plaintiffs' riparian rights in signing the Two- and Four-Party Agreements.

III. Public Nuisance

Defendant contends that plaintiffs have not alleged that they suffered harm different in kind from that suffered by the public in general, a necessary element of a private action for public nuisance under both New York and Vermont common law. *Roy v. Farr,* 128 Vt. 30, 37, 258 A.2d 799, 803 (1969); *Gibbons* v. *Hoffman,* 203 Misc. 26, 115 N.Y.S.2d 632 (1952); Restatement (Second) of Torts § 821C at 94 (1979). Plaintiffs allege in their complaint, however, that the discharges from defendant's mill "interfere with Plaintiffs' use and enjoyment of their property and have decreased the market value and rental value of their property." Such an allegation is sufficient to state

[8] Apparently a significant factor in *Badgley* was the court's conclusion that the rights of riparian owners were not independent of the rights of Pennsylvania, but were merely derivative therefrom and therefore subject to change by Pennsylvania law. *Badgley,* 606 F.2d at 365. This does not alter our holding, however, since the saving clause at issue here could be viewed as a retained right of *the state*—that is, the clause retains the state's right to have claims brought by its citizens and residents resolved by the courts. Viewed from either perspective, the clause clearly excepts claims brought by private citizens or residents from any bar of access to the courts.

a private cause of action for a "nuisance" which might generally be classified as "public." *See Hazen* v. *Perkins,* 92 Vt. 414, 421-22, 105 A. 249 (1918) (where variations in lake depth caused by defendant's dam "accentuated" adverse effects upon plaintiffs' shore properties, injury was "special and distinct," though injury was not substantial); *see also W. Prosser, The Law of Torts* § 88, at 588 (4th ed. 1971); 58 Am. Jur. 2d, *Nuisance* § 111, at 675 (1971) ("Interference with the enjoyment and value of a person's private property rights is a special injury [allowing] recovery from a public nuisance . . . "); Restatement (Second) of Torts § 821C, comments d and e (1979) ("When the public nuisance causes . . . physical harm to [plaintiff's] land . . ., the harm is normally different in kind from that suffered by other members of the public . . .").

CONCLUSION

We find that the FWPCA authorizes actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred; that the State of Vermont did not dispose of plaintiffs' riparian rights when it entered into settlement agreements with IPC and the State of New York; and that plaintiffs have set forth allegations of harm sufficiently different in kind than that suffered by the general public to state a claim for nuisance. Accordingly, defendant's motion to dismiss is hereby Denied.

Dated at Burlington in the District of Vermont, this 5th day of February, 1985.

/s/ Albert W. Coffrin
Albert W. Coffrin
Chief Judge

Order and Judgment of the Court of Appeals
(November 4, 1985)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

Docket No. 85-7506

(SEAL)

At a state Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of November, one thousrand nine hundred and eighty-five.

Present:

HON. IRVING R. KAUFMAN
HON. GEORGE C. PRATT
HON. ROGER J. MINER,
Circuit Judges,

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOUIS T. PATTERSON,

Plaintiffs-Appellees,

v.

INTERNATIONAL PAPER COMPANY,

Defendant-Appellant.

Order and Judgment of the Court of Appeals
(November 4, 1985)

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO
Deputy Clerk

Text of Statutes Relied On
Federal Water Pollution Control Act
§ 1253, 33 U.S.C. § 1253

"§ 1253. Interstate cooperation and uniform laws

(a) The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform States laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution.

(b) The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the Congress."

Federal Water Pollution Control Act
§ 1319, 33 U.S.C. § 1319

"§ 1319. Enforcement

STATE ENFORCEMENT; COMPLIANCE ORDERS

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B)

of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for

compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge

into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

CIVIL ACTIONS

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

CRIMINAL PENALTIES

(c)(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more

than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

CIVIL PENALTIES

(d) Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

STATE LIABILITY FOR JUDGMENTS AND EXPENSES

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a

party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

WRONGFUL INTRODUCTION OF POLLUTANTS INTO TREATMENT WORKS

(f) Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter."

"§ 1341. Certification

COMPLIANCE WITH APPLICABLE REQUIREMENTS; APPLICATION; PROCEDURES; LICENSE SUSPENSION

(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable

period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to

insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

COMPLIANCE WITH OTHER PROVISIONS OF LAW SETTING APPLICABLE WATER QUALITY REQUIREMENTS

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Federal Water Pollution Control Act
§ 1341, 33 U.S.C. § 1341

AUTHORITY OF SECRETARY OF ARMY TO PERMIT USE OF SPOIL DISPOSAL AREAS BY FEDERAL LICENSEES OR PERMITTEES

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

LIMITATIONS AND MONITORING REQUIREMENTS OF CERTIFICATION

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

Federal Water Pollution Control Act
§ 1342, 33 U.S.C. § 1342

"§ 1342. National pollutant discharge elimination system

PERMITS FOR DISCHARGE OF POLLUTANTS

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their terms unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begin on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permits shall issue if the Administrator objects to such issuance.

STATE PERMIT PROGRAMS

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a

statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure com-

pliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

SUSPENSION OF FEDERAL PROGRAM UPON SUBMISSION OF STATE PROGRAM; WITHDRAWAL OF APPROVAL OF STATE PROGRAM

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this

section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

NOTIFICATION OF ADMINISTRATOR

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit

as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, or request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

WAIVER OF NOTIFICATION REQUIREMENT

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

POINT SOURCE CATEGORIES

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines

shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

OTHER REGULATIONS FOR SAFE TRANSPORTATION, HANDLING, CARRIAGE, STORAGE, AND STOWAGE OF POLLUTANTS

(g) Any permit issued under this section for the discharge of pollutants into the navigable water from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

VIOLATION OF PERMIT CONDITIONS; RESTRICTION OR PROHIBITION UPON INTRODUCTION OF POLLUTANT BY SOURCE NOT PREVIOUSLY UTILIZING TREATMENT WORKS

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any

pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

FEDERAL ENFORCEMENT NOT LIMITED

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

PUBLIC INFORMATION

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

COMPLIANCE WITH PERMITS,

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the

application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

IRRIGATION RETURN FLOWS

(*l*) The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit."

Federal Water Pollution Control Act
§ 1365, 33 U.S.C. § 1365

"§ 1365. Citizen suits

AUTHORIZATION; JURISDICTION

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

NOTICE

(b) No action may be commenced—

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

VENUE; INTERVENTION BY ADMINISTRATOR

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

LITIGATION COSTS

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

STATUTORY OR COMMON LAW RIGHTS NOT RESTRICTED

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

EFFLUENT STANDARD OR LIMITATION

(f) For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

Federal Water Pollution Control Act
§ 1365, 33 U.S.C. § 1365

CITIZEN

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

CIVIL ACTION BY STATE GOVERNORS

(h) A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.'

Federal Water Pollution Control Act
§ 1370, 33 U.S.C. § 1370

"§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

(2)

No. 85-1233

IN THE

Supreme Court of the United States

October Term, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

vs.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION

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20 pp

Question Presented

Does the Federal Water Pollution Control Act prohibit an action by property owners, in the Vermont federal district court under Vermont common law, for damages to their Vermont lakeshore properties caused by the discharge of pollutants by a private business enterprise into the boundary waters between New York and Vermont?

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IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1233

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Harmel Ouellette and Lila Ouellette, *et al.* ('Respondents'), respectfully pray that this Court deny the Petition of International Paper Company ('Petitioner') for review of the opinion of the United States Court of Appeals for the Second Circuit, which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin, Chief Judge), entered February 5, 1985.

Counterstatement of the Case

Respondents are 162 owners of lands on the shores of Lake Champlain within the towns of Shoreham, Bridport and Addison, Vermont (JA 33, 186).[1] Respondents use their property primarily for residential and recreational purposes, but also for certain commercial uses such as rental cottages and marinas (JA 189-190). Petitioner is a New York corporation with its principal place of business in New York, and is registered to do business in the State of Vermont (JA 10, 25). It owns and operates a kraft paper mill on the shores of Lake Champlain, opposite Respondents' properties, approximately four miles north of the Village of Ticonderoga, New York. The State of Vermont, as a landowner, is a member of this class action and appears through its Attorney General (JA 6).

Lake Champlain is a navigable body of water and is the largest fresh water lake east of the Great Lakes. It extends from Whitehall, New York, into Canada. The Vermont-New York border is the middle of the deepest channel of Lake Champlain. "An Act . . . Declaring What Shall be the Boundary Line Between the State of Vermont and the State of New York . . .," *Vermont Laws of 1790*; N.Y. State Law, Sec. 4 (McKinney 1984).

[1] "JA" citations are to the Joint Appendix in the Court of Appeals.

Petitioner discharges wastes from its mill into Lake Champlain through a diffusion pipe. The location of the pipe, which runs in a straight line from the New York shoreline toward Vermont and ends approximately 200 feet from Vermont waters, is shown on two maps at JA 31-32.

This suit was instituted in 1978 as a class action seeking injunctive relief and damages for losses resulting from water and air pollution caused by Petitioner's mill. Respondents filed the action in a Vermont state court, but Petitioner removed it to the United States District Court for the District of Vermont, pursuant to 28 U.S.C. §1441(a) (JA 35). In the First Cause of Action, Respondents seek relief from discharges of pulp and paper making wastes which are "foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to plaintiffs' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use." (JA 12). These discharges "interfere with [Respondents'] use and enjoyment of their property and have diminished and will continue to diminish the fair market value and rental value of their property." (JA 12).

Count I alleges that discharges from Petitioner's mill into Lake Champlain constitute a "continuing nuisance" (JA 12); Count II alleges that Petitioner has violated its National Pollutant Discharge Elimination System permit ("NPDES" permit) by discharging pollutants into the Lake in excess of the amounts specified in the permit (JA 13-14); Count III alleges that Petitioner's discharges constitute an unreasonable riparian use (JA 15); Count IV alleges that its discharges were negligent (JA 16-17); and Count V alleges such discharges were malicious,

willful, and undertaken with reckless and wanton disregard of Respondents' rights (JA 17-19). Respondents seek money damages and injunctive relief. Respondents' second cause of action concerns air pollution (JA 19-23), and is not at issue here.

On June 22, 1981, Petitioner moved to dismiss Respondents' first cause of action, pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure. On February 5, 1985, Chief Judge Coffrin held that Respondents could proceed in Vermont court under Vermont common law. *Ouellette v. International Paper Co.*, 602 F.Supp. 264 (D.Vt. 1985) ("*Ouellette*") (A4-25).[2] On May 20, 1985, Chief Judge Coffrin certified for interlocutory appeal three issues pursuant to 28 U.S.C. §1292(b), and stayed all further proceedings with respect to the first cause of action pending the decision by the Court of Appeals.

The Court of Appeals accepted Petitioner's interlocutory appeal and thereafter affirmed the District Court's denial of its motion to dismiss, in a one-page *per curiam* opinion "essentially for the reasons set forth in [the District Court's] thorough opinion, which we adopt in all respects. . . ." (A3). Petitioner seeks review of the Court of Appeals' decision on the first of these three certified issues.

[2] "A" citations are to the Appendix contained Petitioner's Petition for Certiorari, filed with this Court on January 22, 1986.

ARGUMENT

Introduction

Petitioner does not maintain, nor can it, that the Federal Water Pollution Control Act, 33 U.S.C. §§1251 *et seq.* ("FWPCA") preempts state common law actions for pollution-caused damages. A review of the FWPCA itself and its legislative history confirms the conclusion that Respondents' state common law rights were in no way impaired or preempted by passage of the Act. Not only did Congress *not* manifest a clear intention to preempt state common law remedies in passing the FWPCA: it expressly acknowledged the existence of such remedies and clearly preserved them. 33 U.S.C. §1365(e), the so-called "savings clause," provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation *or to seek any other relief* (including relief against the Administrator or a State agency).

Id. (emphasis added). Nothing could be a clearer indication of legislative intent to preserve state common law rights.

The legislative history of the FWPCA provides even more persuasive evidence that Congress intended the saving clause to preserve rights already enjoyed by citizens. The Senate Report accompanying 33 U.S.C. §1365(e) states:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. *Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.*

S.Rep. No. 92-44, 92d Cong., 2d Sess. 81, *reprinted in* 1972 *U.S.Code Cong. & Ad.News* 3668, 3746-47 (emphasis added) (cited in *Ouellette*, 602 F.Supp. at 269) (A12-13).[3]

Moreover, nothing in this Court's decisions in *Illinois v. Milwaukee*, 406 U.S. 91 (1972) ("Milwaukee I"), or *Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("Milwaukee II"), compels a different conclusion. In *Milwaukee I*, this Court was called upon to create a forum within which a state plaintiff could sue the political subdivisions of a sister state, in order to regulate the latter's pollution-causing activities. *Id.*, 406 U.S. at 93, 104-05. *See also*, *Milwaukee II*, 451 U.S. at 309. Since Illinois, a quasi-sovereign, was precluded by the dictates of federalism from pursuing its claims in state court, *Milwaukee I*, 406 U.S. at 94-98, 104; *Milwaukee II*, 451 U.S. at 309, 325, and since no federal statutory remedy then existed, *Milwaukee I*, 406 U.S. at 103, this Court recognized the federal common law of nuisance as a "necessary expedient" to provide the plaintiff state with a federal court forum. *Milwaukee II*, 451 U.S. at 313-14 (quoting *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976)). *See generally* S. Bleiweiss, "Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption," *Harv.Envtl.L.Rev.* 41, 44-45 and n.36 (1983).

Thus, in *Milwaukee I* this Court had neither reason nor occasion to discuss the continued existence of state common law remedies in cases where such remedies would otherwise be available; that is, in cases not between quasi-sovereigns, but between private persons suing other private entities for injuries to themselves or their property. The limited nature of this holding was

[3] See also Statements of Sen. Stafford, *Cong. Rec.* S11305-07 (daily ed. Sept. 12, 1985).

made clear in this Court's subsequent opinion in *Milwaukee II*. There, this Court held that the recently recognized federal common law of nuisance had been preempted by the passage of the FWPCA, which provided just the sort of federal regulatory scheme for control of interstate pollution sought by Illinois in its suit. *Id.*, 451 U.S. at 319-20. Having available to it applicable federal statutory law, Illinois no longer had to resort to the "necessary expedient" of federal common law. *Id.*

Therefore, in *Milwaukee II* this Court had no occasion to discuss the continued vitality of state common law remedies,[4] except to make clear that its preemption analysis was not to be construed as affecting state common law:

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law. In considering the latter question " '*we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.*' "

Id. at 316 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 219, 230 (1947)) (emphasis added). In a footnote, this Court cautioned against extending its preemption analysis to state law remedies:

[4] The only issue on which certiorari was granted in *Milwaukee II* was whether the FWPCA preempted federal common law. This Court subsequently denied Illinois' petition for certiorari challenging the Seventh Circuit's refusal to consider the plaintiff's claims under state common law. *Illinois v. Milwaukee*, 599 F.2d 151 (7th Cir. 1979), *Illinois' petition for cert. denied*, 451 U.S. 982 (1981).

> Since the States are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding preemption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* common law. *Simply because the opinion in Illinois v. Milwaukee used the term "preemption," usually employed in determining if federal law displaces state law, is not reason to assume the analysis used to decide the usual federal-state questions is appropriate here.*

Id. at 317, n.9 (emphasis partly in original, partly added).

This Court also made clear that in *Milwaukee I*, federal common law remedies were necessitated only because state common law was unavailable to Illinois:

> In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. *If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.*

Id., 451 U.S. at 314, n.7 (emphasis added). Thus, although federalism concerns precluded Illinois' reliance on its own state law to establish liability against another state's political subdivisions, such constraints simply do not exist where private parties seek remedies for injuries held compensable under their own state common law. Clearly, in such cases "state common law can be applied, [and] there is no need for federal common law." *Id.*

Indeed, this Court itself found state law to control at the time the FWPCA was passed:

> It must be noted that the legislative activity resulting in the 1972 Amendments largely occurred prior to this Court's [1972] decision in *Illinois v. Milwaukee* [*Milwaukee I*]. Drafting, filing of

> Committee Reports, and debate in both Houses took place prior to the decision. Only conference activity occurred after. It is difficult to argue that particular provisions were designed to preserve a federal common law remedy not yet recognized by this Court.

Milwaukee II, 451 U.S. at 327 n.19 (quoted in *Ouellette*, 602 F.Supp. at 269-70, and referring to *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493 (1971) (A14).

For these sound reasons, the Second Circuit affirmed Chief Judge Coffrin's determination that state common law remedies survived passage of the FWPCA:

> Consideration of the express language of the saving clause and state authority provision of the Act, the legislative history, and the stated objectives of the Act inevitably leads one to the conclusion that Congress intended to authorize resort to state nuisance law in situations such as the instant one.

Ouellette, 602 F.Supp. at 272 (A19-20).

Thus, rather than arguing that the FWPCA preempts Respondents' cause of action, Petitioner argues that Respondents can only sue (1) in New York courts, and (2) under New York law. In so arguing, Petitioner is asking the courts to develop a new common law rule of subject matter jurisdiction: only the courts of the state where industrial pollution originates have subject matter jurisdiction to hear actions for damages caused by the pollution. Since, obviously, Vermont federal courts can apply New York law as well as New York federal courts, if that is required, the only possible basis for Petitioner's argument to disqualify Vermont federal courts is the one stated in the petition: bias and local prejudice on the part of Vermont federal courts. Pet. at 6.[5] These

[5] "Pet." citations are to the Petition for Certiorari, filed with this Court on January 22, 1986.

allegations, which insult and misapprehend the role of the federal judiciary, hardly merit full attention in this brief.

Petitioner's second contention, that New York rather than Vermont common law must be applied, is itself a "red herring". Not only is the question not dispositive of the underlying motion to dismiss, but there have been absolutely no demonstrated differences between New York's common law of nuisance or negligence, and that of Vermont.

Petitioner ultimately looks to the opinion of the Seventh Circuit Court of Appeals in *Illinois v. Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *as amended*, Nos. 77-2246 and 81-2236 (7th Cir. May 29, 1984), *cert. denied sub nom. Scott v. City of Hammond*, 105 S.Ct. 979 (1985) ("*Milwaukee III*"), as the basis for its Petition. However, the Vermont District Court closely examined this opinion and, given a very different set of facts, reached a different result. Despite disagreement in the analysis used by Chief Judge Coffrin and the Seventh Circuit, and given the significant, underlying factual differences, the holdings of the two cases are not inconsistent. For this reason, there is no conflict between the Circuits to justify certiorari in this instance.

The decision below is not in conflict with, and is wholly distinguishable from, the decision by the Court of Appeals for the Seventh Circuit in *Milwaukee III*.

Petitioner's primary argument in support of its petition for certiorari is that the "decision below directly conflicts with the decision of the Seventh Circuit in *Milwaukee III*." Pet. at 5. A close analysis of these cases, and of this Court's decisions in *Milwaukee I* and *II*, reveals that no such conflict exists.

Respondents respectfully submit that the Seventh Circuit decision is distinguishable on its facts, in two important respects, from that of the Second Circuit. Most importantly, *Milwaukee III* involved a suit between quasi-sovereign states and their political subdivisions. *Id.*, 731 F.2d at 404-05, 407.[6] In the instant suit, private landowners are suing a private business enterprise. *Ouellette*, 602 F.Supp. at 271 (A18).

Moreover, in *Milwaukee III*, one state was seeking to regulate and control the effluent levels discharged by its sister state's political subdivisions into interstate waters. *Id.* Here, Respondents seek compensation for injuries caused to their properties by Petitioner, a private business entity discharging pollutants within a mile of their shoreline, and injunctive relief to minimize the likelihood that such pollution will continue to damage their properties. *Ouellette*, 602 F.Supp. at 171 (A18). Thus, while the opinion rendered by Seventh Circuit speaks to issues arising between quasi-sovereigns concerning regulation of interstate water pollution, that of the Second Circuit simply addresses common law actions between private entities for damages resulting from tortious conduct. As such, the cases present no conflict necessary for resolution by this Court.

Nor does the Court's ruling in any way alter the balance of power between the federal government and neighboring states, "render meaningless the permit scheme of the FWPCA," or place Petitioner in the position of being subject to potentially conflicting

[6] As the Seventh Circuit pointed out, "[i]t may well be significant . . . that, except for the case in which Scott is plaintiff, these are attempts by a state to regulate municipalities of another state in the discharge of their public responsibilities." *Milwaukee III*, 731 F.2d at 407. Notably, Scott was then dismissed from the suit by the Circuit Court for lack of standing. *Id.* at 415-16.

regulation by a multiplicity of entities. Pet. at 5-6. Federalism issues simply do not arise where private parties sue each other for injuries resulting from wrongful acts, even if the parties are from separate states. In fact, state law has historically been relied upon to resolve just such disputes:

> A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, for maintenance of a nuisance, for blasting operations, and for negligent manufacture.

Young v. Masci, 289 U.S. 253, 258-59 (1933) (citations omitted) (cited in *Ouellette*, 602 F.Supp. at 270) (A15).

Moreover, Petitioner's contention that it will now be subject to conflicting regulatory schemes is without merit. Petitioner remains subject to regulation only as mandated by the FWPCA and the laws of New York. Its liability for wrongful conduct which creates a nuisance to its neighboring lakeside property owners does not intrude upon that regulatory scheme. The common law of nuisance, as applied to private disputes, does not "implicate the regulatory powers of the states in which the parties are located." *Ouellette*, 602 F.Supp. at 271 (A18). Rather, compensatory damages simply compensate for injuries, leaving the wrongdoer "free to operate so long as it pays for the injury it causes." *Id.* Injunctive relief, by the same token, "is designed primarily to redress a plaintiff's particular injury. . . . A

state's nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare, and property rights of its own residents." *Id.* at 271-72 (A18-19).

It is only where interstate pollution disputes arise between quasi-sovereign entities, concerning attempts by one to regulate the conduct of the other or its citizens, that federalism issues and preemption analysis come into play. That was the case in *Milwaukee I*, *II* and *III*. It is not the case in the instant dispute, and Petitioner's attempts to exploit the interstate aspect of this litigation and characterize it as raising such issues is obfuscatory and misleading.

As such, the Second Circuit, in affirming the District Court decision, rejected Petitioner's contention that the FWPCA in any way bars or hinders the instant action:

> Given the state of the law during the time of the FWPCA's framing, it is completely reasonable to assume that Congress believed that a plaintiff suffering in State A might sue under the laws of State A to recover for injuries sustained as the result of pollution emanating from State B. It thus seems inescapable that Congress, by passage of the FWPCA's saving clause and state authority provisions, intended to preserve just such an action.

Ouellette, 602 F.Supp. at 270 (A15).

The Court buttressed its conclusion by recognizing that the application of traditional common law remedies for nuisance would *not* interfere with the objectives of the FWPCA.

> Congress, in passing the Act sought "to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into

> navigable waters. S.Rep. 92-414, 92d Cong., 2d Sess. 81, *reprinted in U.S. Code Cong. & Ad. News* 3668, 3678. To this end, states' imposition of compensatory damage awards and other equitable relief for injuries caused by discharges into interstate waters merely *supplement* the standards and limitations imposed by the Act.

Id. (emphasis in original) (A17).

Finally, the Court emphasized that permitting this private nuisance action to proceed under state law would not interfere with Petitioner's "right" to discharge under its NPDES permit:

> [T]here is no indication that Congress ever intended that the NPDES permit confer an absolute right to discharge to the extent allowed by the permit. Since compliance with the Act does not constitute a defense to a common law action for damages, *see* S.Rep. 92-414, *supra*, Congress must have recognized that some uncertainty would result to dischargers of pollutants. The goal of FWPCA is not finality; rather, it is the elimination of the discharge of pollutants.

Id. at 271 (A17-18).

In adopting the sound and careful analysis employed by the District Court, the Second Circuit properly concluded that the instant case is wholly distinguishable on its facts from the case before the Seventh Circuit. As such, legal conclusions reached by the Seventh Circuit are not applicable here. On this basis, the Second Circuit has allowed Respondents' state common law claims to proceed in the courts and under the laws of Vermont, the state of injury. The Circuit Court decision is not only distinguishable from that of the Seventh Circuit, but is consistent with prior decisions of this Court. For all these reasons, the petition for certiorari should be denied.

Conclusion

Respondents respectfully submit that the petition for certiorari should be denied in all respects.

Respectfully submitted,

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No. 85-1233

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OCTOBER TERM, 1985

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HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner International Paper Company ("IPCo")* respectfully submits this reply brief in response to the brief of Respondents in opposition and in further support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit

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* A listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of International Paper Company is on page i of the Petition for a Writ of Certiorari, filed with this Court on January 22, 1985.

which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin, U.S.D.J.), *Ouellette* v. *International Paper Co.*, 602 F. Supp. 264 (D.Vt. 1985). In that decision, the District Court denied IPCo's motion to dismiss Respondents' first cause of action on the ground that Vermont had jurisdiction over a flow of effluent into interstate waters that emanated from a source located in New York.

ARGUMENT

The central contention of Respondents' brief in opposition is that there is no direct conflict between the decisions of the courts below and the decision of the Seventh Circuit in *Illinois* v. *Milwaukee*, 731 F.2d 403 (7th Cir.), as amended, nos. 77-2246 and 81-2236 (7th Cir. May 29, 1984), cert. denied sub nom. *Scott* v. *City of Hammond*, 105 S. Ct. 979 (1985) (*"Milwaukee III"*). As is clear from Respondents' own papers, however, and as the Vermont District Court acknowledged, 602 F. Supp. at 268 (A11),* these two decisions represent diametrically opposed approaches to and interpretations of this Court's prior decisions and of the Federal Water Pollution Control Act ("FWPCA"). The courts in both cases were presented with the identical issue and reached opposite conclusions, not because of differences in the nature of the suits or of the parties, but because of differences in each court's understanding of the interrelationship between the savings clause of the FWPCA and this Court's decisions, which held, in *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) (*"Milwaukee I"*), that state jurisdiction over the discharge of effluent into interstate waters was "preempted" by federal common

* "A" citations are to the Appendix contained in Petitioner's Petition for Certiorari.

law, and, in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (*"Milwaukee II"*), that federal common law regulation of discharges into interstate waters was superseded by the regulatory scheme embodied in the FWPCA.*

Respondents attempt before this Court to distinguish the present case from *Milwaukee III* on the basis that *Milwaukee III* involved a suit by one state against quasi-sovereign political subdivisions of a second state, whereas the present action is one by private landowners against a private business enterprise, even though the State of Vermont is joined as a member of the plaintiff class. Respondents seek to distinguish between a state using its laws to regulate and control effluent discharged by a sister state's political subdivisions, and private landowners using one state's nuisance laws to seek injunctive relief and compensation for damages allegedly caused by the discharge of effluents into interstate waters by a source located in another state. They read this Court's "preemption" analysis in *Milwaukee I* as nothing more than a necessary expedient to provide Illinois with a forum in which to bring a nuisance suit directed at the City of Milwaukee and other instrumentalities of Wisconsin (Respondents' Brief, p. 6).**

* Respondents (Brief, p. 8) read this Court's remark in *Milwaukee II* that it is not possible for federal and state common law nuisance jurisdiction to coexist, 451 U.S. at 314, n. 7, as supporting their notion that state common law nuisance jurisdiction over discharges in interstate waters survived *Milwaukee I*. This argument clearly misconstrues *Milwaukee II*. *See Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 n. 13 (1981).

** Respondents also read this Court's warning in *Milwaukee II*, 451 U.S. at 316-17, against misconstruing the "preemption" analysis it used there to hold that federal common law was "preempted" by the FWPCA as an appropriate standard to determine whether state law had been preempted by federal law, as indicating that *Milwaukee II* sustains the continued existence of state common law with regard to discharges into interstate waters. Respondents' Brief, pp. 7-8.

Despite Respondents' claims, this Court's prior decisions make clear that preemption analysis does not come into play "only where interstate pollution disputes arise between quasi-sovereign entities, concerning attempts by one to regulate the conduct of the other or its citizens." (Respondents' Brief, p. 13). As discussed in the Petition, pp. 17-18, this Court has ruled that federal law governs interstate water disputes regardless of the nature of the parties. *See Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 n. 13 (1981); *see also* cases cited in Petition, p. 17, at footnote *. As this Court observed in *Milwaukee I*, "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n. 6. There is nothing in either *Milwaukee I* or *Milwaukee II* to suggest that federal law is only applicable to the regulation of the use of interstate waters where the litigants are sovereign entities rather than private parties, and such a conclusion cannot be reconciled with the reasoning behind these decisions.

Nor did the Seventh Circuit hold in *Milwaukee III* that federal law should apply only because the case involved quasi-sovereign entities and states disagreeing over the use of interstate waters. Instead, *Milwaukee III* recognized that both the statute and this Court's precedents make the regulation of interstate waters a matter of federal jurisdiction so that state common law regulation had to give way. As the Seventh Circuit observed,

> "Given the logic of *Milwaukee I* and *Milwaukee II*, we think federal law must govern in this situation except to the extent that the 1972 FWPCA (the governing federal law created by Congress) authorizes resort to state law." 731 F.2d at 411.

While the Seventh Circuit fully understood that the scheme of the FWPCA embodied both federal and state regulation of sources of pollution, it concluded that FWPCA §§ 1365(e) and 1370 could not have "saved" jurisdiction of an impacted state over interstate waters, because that jurisdiction had been repudiated by *Milwaukee I* before the FWPCA was enacted. 731 F.2d at 413-14.*

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* The Seventh Circuit went on to observe, however, that

> "[t]his provision [§ 1365(e)] may well preserve a right under statutes or the common law of the state within which a discharge occurs (State I) to obtain enforcement of prescribed standards or limitations. . . . However, it seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I. . . . 731 F.2d at 414."

While the Seventh Circuit dismissed the various actions, it specifically upheld the applications of Wisconsin or Indiana law by "state or federal courts in one of those states at the suit of out of state parties affected by discharges in that state." 731 F.2d at 411 n. 3. Respondents contend (Respondents' Brief, p. 9) that Petitioner argues that Respondents can only sue in New York courts and under New York law and that Petitioner is thereby "asking the courts to develop a new common law rule of subject matter jurisdiction". It is not Petitioners who have suggested "a new common law of subject matter jurisdiction". Rather, the Seventh Circuit inferred from the language of the FWPCA an intent of Congress, which it (and the Solicitor General, see Brief for the United States in *Milwaukee III*, p. 12) thought to be consistent with the comprehensive regulatory scheme it enacted, which assigned a significant regulatory role to each state, as well as to the federal EPA, to regulate sources of pollution *within its borders*. 731 F.2d at 411. The Seventh Circuit understood that the states lacked such jurisdiction over interstate waters in view of *Milwaukee I*. We have discussed, Petition at pp. 20-21, and summarize at pp. 6-9 *infra*, the compelling policy reasons which support the Seventh Circuit's reasoning. Although the Vermont district court and the Second Circuit were not persuaded by the reasoning of the Seventh Circuit, there is nothing novel in a statutory scheme which accords to the courts of one state (including federal courts sitting in diversity cases) the responsibility to exercise an essentially local regulatory jurisdiction over pollution sources

(footnote continued on following page)

This holding, which is supported by both the statute and the case law, represents a very different analysis of the FWPCA and the role of state law than that employed by the Second Circuit and adopted by Respondents. It is this difference between the two cases, and not an immaterial distinction in the nature of the parties involved, that is crucial, and it is this difference that requires this Court's resolution.

Respondents' second attempt to create a distinction between *Milwaukee III* and the instant case, which is based on the nature of the relief sought, is similarly flawed and equally inconsistent with what the Seventh Circuit understood to be the holdings of this Court in *Milwaukee I* and *Milwaukee II*, as well as the effect of the FWPCA. Respondents contend that the common law of nuisance, as applied to private disputes, does not "implicate the regulatory powers of the states in which the parties are located," *Ouellette* v. *International Paper Co.*, 602 F. Supp. 264, 271 (D. Vt. 1985), but instead "is designed primarily to redress a plaintiff's particular injury." *Id.* at 271-72. In real terms, however, this distinction is meaningless, as this Court has recognized in other "preemption" contexts. *See, e.g., San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief."); *Garner* v. *Teamsters Union*, 346 U.S. 485, 492-97 (1952).

The relief sought here—more than a hundred million dollars and injunctive relief that might force the reconstruc-

(footnote continued from preceding page)

within its boundaries, while withholding such authority from courts in other states. *See* FWPCA § 1365(c) which requires that suits for enforcement under the Act be brought in the judicial district in which the source is located. (A52).

tion or shutdown of Petitioner's mill—would plainly interfere with the regulatory authority of the state where the mill is located. A state's efforts to regulate a source located within its boundaries which discharges into interstate waters could be rendered meaningless if courts and juries in each state contiguous to those waters could impose new and possibly conflicting requirements in the form of equitable relief or damage awards of sufficient magnitude to require process changes or even the termination of the discharger's operations.*

Respondents finally seek to suggest that no immediate conflict is presented for resolution in this case because differences between the common law of nuisance in New York and Vermont are minimal, and contend that the sole basis for Petitioner's appeal is to avoid bias and local prejudice on the part of Vermont federal courts. The issue presented in this case is whether Vermont has legislative or judicial jurisdiction over Respondents' claims. While Respondents' desire to try their claims before a Vermont jury

* This conclusion does not imply that a state or its citizens are powerless to protect their own interest in discharges from out-of-state sources. Numerous provisions in the FWPCA ensure a state ample opportunity to participate in the permitting process. *See, e.g.*, § 1341(a)(2) (A36-37); § 1342(b) (A42-45), and the Seventh Circuit's decision carefully protects the rights of other states and their citizens to sue in the courts of the source state under the laws of that state, as well as under the federal statute. As the Seventh Circuit recognized, the regulatory scheme embodied in the FWPCA supports the legislative jurisdiction of the state where a source is located to adopt more stringent requirements than are directly imposed by federal law, and also endorses the jurisdiction of the courts sitting in the state where the source is located to enforce that state's regulatory requirements, whatever their basis. This fact undoubtedly influenced the Seventh Circuit in its decision to sustain the legislative and judicial jurisdiction of the source state. The difference between the Seventh Circuit and the Second Circuit is primarily over the question whether Congress gave any such sanction to the exercise of regulatory enforcement power by states other than the source state.

in a Vermont district court and the implications of possible bias with which such an arrangement is fraught are obvious factors which bear upon this Court's—and Congress'—determination how best to preserve federal principles in regulating the use of interstate waters, the controversy here does not reduce itself to the simple question Respondents posit. The ultimate question is what Congress did when it enacted the FWPCA. The alleged similarity of the nuisance law of New York and Vermont is hardly an acceptable predicate to determine whether or not Vermont's common law may appropriately be applied to a source of effluent located in New York, and nothing in this Court's decisions or in the FWPCA suggests that it is an appropriate criterion in this case.

More important, if the Second Circuit is correct, a facility located in one state which discharges into an interstate body of water may be sued in every state on which that body of water touches, under the potentially conflicting law of each state and the possibly conflicting outcomes of suits in each state, Petition, pp. 20-21. Such a result places Petitioner (and others like it) in the untenable position of being subject to regulation, through statute and case law, not only by the EPA and the state in which it is located but also by all states with borders contiguous with the interstate bodies of water into which its discharges are made.

CONCLUSION

Despite Respondents' attempts to distinguish *Milwaukee III* and the decision below, a direct conflict exists between the two federal courts of appeal that have confronted and examined the question whether, in spite of *Milwaukee I*, the FWPCA authorizes states or their citizens to bring an action in their own courts under their own laws against

a source located in another state. This conflict concerns an issue of considerable importance, both to Petitioner and to all other entities that discharge into interstate waters, that is likely to arise repeatedly. Petitioner submits that this case is an appropriate vehicle for the Court to resolve that important federal question.

Respectfully submitted,

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No. 85-1233 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 22, 1986
CERTIORARI GRANTED MARCH 24, 1986

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Location Map, *Performance of Waste Treatment Facilities at International Paper Company's "New Mill" at Ticonderoga, N.Y.*, Hydroscience, Inc., Figure 1 (1972), Produced by Defendant in Response to Plaintiffs' Interrogatories on January 11, 1980 198

The following opinions, orders and judgments have been omitted in printing this Joint Appendix because they appear in the appendix to the Petition for a Writ of Certiorari filed with this Court on January 22, 1986.

Page in Appendix to Petition

Opinion of the United States Court of Appeals for the Second Circuit, *Ouellette* v. *International Paper Company*, No. 85-8506, dated November 4, 1985 1

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Docket Entries

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

78 Civ. 163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, Individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY.

Date	*NR*	*Proceedings*
1978		
July 26	1	Filed Verified Petition for Removal.
July 26	2	Filed Bond for Removal.
July 26	3	Filed Notice of Petition for Removal.
July 26	4	Filed Deft's Answer. rer
July 28	5	Filed Docket entries, Complaint, Summons and return of service received from Addison County Superior Court. rer

Date	*NR*	*Proceedings*
Aug. 4	6	Filed Plaintiffs' Objection to Removal. cp
Aug. 21	7	Filed Plaintiffs' Memorandum in Support of Objection to Removal. rpd
Aug. 30	8	Filed Defendant's Memorandum in Opposition to Plaintiffs' Motion to Remand. cp
Sep. 1	9	Filed Deft's Certificate of Service re P#8. rer
Sep. 6	10	Filed Pltfs' Reply Memorandum to Deft's Memorandum in Opposition to Pltfs' Motion to Remand. rer
Sep. 7	11	Filed corrected copy of Page 2 of Plaintiffs' Reply Memo (P#10). cp
Nov. 3		In Chambers, Court advises counsel of his personal concern of the lake conditions (he feels he may be objective in this matter). Peter Langrock, Esq. and Susan Humphreys, Esq. for plaintiffs; John Dinse, Esq., Spencer Knapp, Esq., James W.B. Benkard, (Ms) Jamie Stern, Esq. and Robert M. Hunziker, Esq. for defendants.
Nov. 3		All counsel state that they have no qualms about the court deciding this matter—Court to go forward in this case.

Date	*NR*	*Proceedings*
Nov. 3		In open Court, hearing on plaintiffs' "objection to removal" considered by the court as a motion to remand.
Nov. 3		ORDERED: Motion denied. Plaintiff has 90 days from today to file motion for class action determination. gc
Nov. 4	12	Filed motion of Pltfs and H. Vaughn Griffin, Sr., Ardath Griffin, Alan Thorndike & Ellen Thorndike, proposed intervenors, to intervene.
Nov. 4	13	Filed memorandum in Support of motion to intervene.
Nov. 6		At the Call of the Calendar before Judge Coffrin, it was
Nov. 6		Ordered: Case continued for term; no further continuances granted.
Nov. 21	14	Filed Order—Motion of H. Vaughn Griffin, Sr., Ardath Griffin, Alan Thorndike & Ellen Thorndike to Intervene as party pltfs. granted. Mailed copy to Attys. rer
Nov. 24	15	Filed Deft's Consent to granting of Pltfs' Motion for Intervention, P# 12. rer
Nov. 29	16	Filed Plaintiffs' Motion to Allow Wesley C. Larrabee, Virginia Larrabee, F. Alfred Patterson, Jr., and Lois T. Patterson to Intervene as Plaintiffs. cp

Date	*NR*	*Proceedings*
Dec. 22	17	Filed Pltfs' Interrogatories to Deft. International Paper—First Set.
Dec. 22	18	Filed Order motion to intervene as party pltfs of Wesley C. & Virginia Larabee, F. Alfred & Lois T. Patterson is granted. Copy to Attys.
1979		
Jan. 16	19	Filed Pltfs' Motion for Class Determination.
Jan. 16	20	Filed Pltfs' Memo in support of P#19.
Jan 16	21	Filed Pltfs' Certificate of Service re P#19 & 20. rer
Jan. 29	22	Filed Deft's Motion for extension of time for filing Memo in Opposition to Pltfs' Motion for Class Action, by 50 days.
Jan. 29	23	Filed Deft's Memo in support of P#22. rer
Jan. 31	24	Filed Stipulation—that the time for defendant International Paper Company to answer or object to Plaintiffs' Interrogatories to Defendant International Paper Co.—First Set is extended from January 23, 1979 to February 22, 1979. cp
Feb. 11		Upon consideration of Stipulation, P#24, it is So Ordered that the time be extended from January 23, 1979 to February 22, 1979. Mailed copy to Attys. rar

Date	*NR*	*Proceedings*
Mar. 2	25	Filed Plaintiffs' Motion to Compel Defendant to Respond to Interrogatories—First Set dated (12/21/78): Memo in Support of Motion.
Mar. 6	26	Filed Order—Deft's Motion for Extension of Time for filing Memo in Opposition to Pltfs' Motion for Class Action granted; Deft. to file Memo on or before 4-24-79. Mailed copy to attys. rer
Mar. 13	27	Filed Deft's Memorandum of Law in Opposition to Pltfs' Motion to Compel Answers to Pltfs' Interrogatories—with Exhibit 1 attached.
Mar. 13	28	Filed Affidavit of James B. Benkard, dated March 12—with Exhibits "A" and "B" attached. gjl
Mar. 28	29	Filed Affidavit of Jean Anderson, Town Clerk of Shoreham, dated March 26—With attached lists of all landowners with property bordering Lake Champlain in the Town of Shoreham.
Mar. 28	30	Filed Affidavit of Richard L. Roscorla, Town Clerk of Bridport, dated March 22—With attached lists of all lake shore land owners of the Town of Bridport.
Mar. 28	31	Filed Affidavit of Jane B. Grace, Town Clerk of Addison, dated March 22—With attached lists of all lake shore land owners of the Town of Addison.

Date	*NR*	*Proceedings*
Mar. 28	32	Filed Certificate of Service for pgs. #29, 30 & 31. gjl
April 19		In open Court before Judge Coffrin, hearing on plaintiffs' motion to compel. Peter Langrock, Esq. for plaintiffs; James W.B. Benkard, Esq. for defendant.
April 19		Ordered: Motion denied.—Court directs counsel to get together and narrow the discovery area. gc
April 27	33	Filed Deft's Memo in Opposition to maintenance of case as class action.
April 27	34	Filed Affidavit of Robert J. Bachorik with Exhibits A & B attached, submitted by deft. rer
May 1		At the Call of the Calendar before Judge Coffrin, it was
May 1		Ordered: Case continued. cb
May 9	35	Filed Pltfs' Motion for Extension of Time (14 days) in which to respond by filing Memo in Opposition to Deft's Memo of Law in Opposition to Maintenance of case as class action, P#33. re
May 10		Based upon the foregoing Motion, it is ORDERED: granted. Copies mailed to attys. gl
May 11	36	Filed Deft International Paper's Consent to Pltfs' Motion for Extension of Time etc., P#35. rer

Date	*NR*	*Proceedings*
May 22	37	Filed Pltfs' Reply Memo on Class Certification Issue. rer
May 24	38	Filed Deposition of Lois Patterson.
May 24	39	Filed Deposition of F. Alfred Patterson, Jr.
May 24	40	Filed Deposition of Clifton Browne.
May 24	41	Filed Deposition of Edla Browne.
May 24	42	Filed Deposition of Harmel Ouellette.
May 24	43	Filed Deposition of Lila Ouellette.
May 24	44	Filed Deposition of Wesley Larrabee.
May 24	45	Filed Deposition of Virginia Larrabee.
May 24	46	Filed Deposition of Ellen Thorndike.
May 24	47	Filed Deposition of Alde Plooffe.
May 24	48	Filed Deposition of Shirley Plooffe.
May 24	49	Filed Deposition of Ardath Garrett Griffin.
May 24	50	Filed Deposition of H. Vaughn Griffin, Sr. gl
June 8	51	Filed Plaintiffs' Motion to Amend Complaint with Memorandum in Support. cp
June 19	52	Filed Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion to Amend. gl

Date	*NR*	*Proceedings*
Oct. 9		At the Call of the Calendar before Judge Coffrin, it was
Oct. 9		Ordered: Case passed until motions heard.
1980		
Jan. 11	53	Filed Deft's Answers & Objections to Pltfs' 1st Set of Interrogatories, P#17. rer
Mar. 5		Calendar call before Judge Coffrin, it was
Mar. 5		Ordered: Case passed.
Apr. 7		In Court before Judge Coffrin, hearing on plaintiffs' motion to amend Complaint. Peter Langrock, Esq. and Susan Humphreys, Esq. for plaintiffs; Spencer Knapp, Esq., James W.B. Benkard, Esq., Robert M. Hunziker, Esq. and Kevin Simmons, Esq. for defendant.
Apr. 7		Ordered: Motion granted.
Apr. 7		Hearing on motion for class certification.
Apr. 7		Statements made by Mr. Langrock and by Mr. Benkard.
Apr. 7		Taken under advisement. gc
Apr. 7	54	Filed defendant's supplementary memorandum of law in opposition to maintenance of this case as a class action. gc

Date	*NR*	*Proceedings*
Apr. 24	55	Filed Opinion and Order—Certification of Air Class—DENIED. Certification of Water Class AFFIRMED for lakeshore owners in Towns of Bridport and Shoreham. Counsel to prepare Notice to class members and submit to court 21 days from the date of this Order. Copy to attorneys. cp
May 5	56	Filed Pltfs' Motion for Reconsideration.
May 5	57	Filed Pltfs' Memo in support of P# 56 w/map attached.
May 5	58	Filed Pltfs' Affidavit of Susan F. Humphrey, Esq., in re P#56. rer
May 14	59	Filed Deft's Motion for Amendment of Opinion & Order.
May 14	60	Filed Deft's Memo in support of P #59 & Memo in Opposition to P #56, Pltfs' Motion for Reconsideration. rer
May 16	61	Filed Affidavits of Susan F. Humphrey. rpd
June 23	62	Filed Stip.—Deft. Consents to enlargement of class to inc. property owners in Addison (south of Crown Pt. Bridge) re P#56 & in re P#55, Opinion & Order, & P#59, Deft's Motion to Amend same, Pltfs' have no objections to modification but

Date	*NR*	*Proceedings*
		reserve right to challenge defenses raised by deft. as not individual with ORDER granting same thereon. Mailed cpy/attys. rer
July 16	63	ORDERED: Notice to Class Members should follow the format in this order. 2. Pltfs' to prepare necessary number of notices. 3. Pltfs' shall address envelopes affix postage and submit them to Clerk for stuffing and mailing. 4. Pltfs' shall also cause to be prepared a return post-card as described in the order. 5. The notices, envelopes and cards shall be supplied to the Clerk's Office for processing or before 8-29-80. 6. Pltfs' shall also furnish to the Clerk, with copy to counsel a typewritten list of the names and addresses of all persons to whom the envelopes are addressed. Copy to Attys. gww
Aug. 13	64	Filed copy of approved Notice to Class Members. Mailed original to Attorney Eaton for further action. cb
Aug. 18		In Chambers before Judge Coffrin, informal conference re differences of counsel with respect to the language in the notices. Peter Langrock, Esq. for plaintiffs; Spencer Knapp, Esq. for defendant.

Date	*NR*	*Proceedings*
Aug. 25	65	Filed Plaintiff's letter with an attached alphabetical list by towns of lakeshore owners whom they addressed envelopes to receive the Notice pursuant to ORDER dated Jul 16, 1980, P#63. cp
Aug. 27	66	Filed Clerk's Cert. of Serv. re Notices mailed to class members concerning Order, P#63; list attach. Mailed cpy/Cert. to attys.
Oct. 1	67	Filed List of Member Pltfs requesting exclusion in this action. cp
Oct. 1	68	NOTICE OF APPEARANCE of Frederick deG. Harlow, Esq. for Paschal F. and Esther D. Mondella, Class members. gww
Oct. 3	69	INTERROGATORIES by Deft to all Listed Pltfs & Class Members.
Oct. 3	70	CERTIFICATE of Service by Deft for P#69. gww
Oct. 3	71	REQUEST for Exclusion from Class of Guy E. Smith. gww
Oct. 7		At the Call of the Calendar before Judge Coffrin, it was Ordered: Case continued.
Oct. 14	72	Filed Plaintiffs' Motion For A Protective Order.
Oct. 14	73	Filed Plaintiffs' Memorandum of Law in Support of P#72. cp

Date	*NR*	*Proceedings*
Oct. 16	74	Filed Plaintiffs' Motion to Contact Lessees.
Oct. 16	75	Filed Plaintiffs' Memorandum in Support of P#74. cp
Oct. 27	76	Filed Stip.—Parties consent to extension of time (to 10-31-80) in which deft. may file Memo in response to P#72, Pltfs' Motion for Protective Order. rr
Oct. 28		ORDER—Stipulation, P#76, is so Ordered. Copy to Attorneys. rpd
Oct. 31	77	Filed Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Protective Order, P#72.
Oct. 31	78	Filed Defendant's Certificate of Service. cp
Nov. 5	79	Request for Exclusion from class action of Nicholas Biscoe. rr
Nov. 26		Mailed Ltr to Messers Burrell and Dolphin, possible class members advising them of their right as lessees to Revoke their previous requests for exclusion. (P#67) Reply card to be returned to Clerk of Court within 10 days.
Dec. 15		In Court before Judge Coffrin, hearing on plaintiffs' motion for protective order. Susan Eaton, Esq. for plaintiffs; Spencer Knapp, Esq., James Benkard, Esq. and Kevin Simmons, Esq. for defendant.

Date	*NR*	*Proceedings*
Dec. 15		Matter held under advisement. Court suggests that counsel work out a modified method of discovery or interrogatories. (Counsel to advise the court as to the status of the matter) gc
Dec. 16	80	Filed Pltfs' Response to Question 6 of Deft's First set of Interrogatories. rpd
Dec. 22	81	Filed Letter dated 12-17-80 from Pltfs' attorney relative to inclusion of Mrs. Ethel Kelley as a class member of this law suit. rer
1981		
Feb. 6	82	Filed Letter to counsel from Clerk re inclusion of Mrs. Ethel Kelley as a class member (refer to pp. 81 and 67). cb
June 22	83	Filed defendant's Notice of motion to dismiss.
June 22	84	Filed Memorandum of law in support of defendant's motion to dismiss plaintiffs' first cause of action. gc
June 22		Status Conference held. Peter Langrock, Esq. and Susan Eaton, Esq. for plaintiffs; Spencer Knapp, Esq., James Benkard, Esq. and Ms. Jamie Stern, Esq. for defendant.
June 22		Statements made by counsel.

Date	*NR*	*Proceedings*
June 22		Ordered: plaintiffs have 30 days to respond to defendant's motion to dismiss (paper # 83); defendant has an additional 10 days thereafter to file reply memorandum.
June 22		Court will subsequently set a date for hearing on defendant's motion to dismiss and further preliminary conference as to how the case should be tried. gc
July 23	85	Filed plaintiffs' memorandum of law in opposition to defendant's motion to dismiss. gc
Aug. 5	86	Filed defendant's reply memorandum of law in support of defendant's motion to dismiss plaintiffs' first cause of action. gc
Sep. 25	87	LETTER from Atty Eaton stating that Philip Small of Shoreham should be removed from list of class members.
1982		
Feb. 1	88	LETTER dated 1-28-82 from Lawrence and Wanda Krause stating new address is 3471 Bender Avenue, Akron, Ohio 44319. rer Copy to attys. gww
Mar. 16	89	LETTER change of ownership of classmember from Howard, Leonard A., Jr., and Virginia to Holzinger, Ulrich G. and Jean M. gww

Date	*NR*	*Proceedings*
May 7	90	MOTION to Reconsider Denial of AIR CLASS by Pltfs.
May 7	91	MEMORANDUM in support of P# 90. gww
May 20	92	STIPULATION that deft be granted an extension of time, until 7-1-82, in which to file a memorandum of law in opposition to pltfs' Motion to Reconsider Denial of Class Certification of the Air Class, P#56. rer
May 26		ORDER—STIPULATION—So ORDERED. Cy to attys. (re: P#92) cp
July 1	93	MEMORANDUM in Opposition to Pltfs' Motion to Reconsider Denial of Class Certification of the Air Class, P# 91, with attachments. rer
July 1	94	CERTIFICATE OF SERVICE re P#93. rer
Sep. 24		In court before Judge Coffrin, hearing on plaintiffs' motion to reconsider denial of class certification of the Air Class. Peter Langrock, Esq. and Susan Eaton, Esq. for plaintiffs; James W. B. Benkard, Esq. and John Dinse, Esq. for defendant.
Sep. 24		Statements made to court by counsel.

Date	*NR*	*Proceedings*
Sep. 24		Taken under advisement. gc
Oct. 29	95	OPINION AND ORDER — AWC — Pltfs directed to identify potential class members (members of the certified water class who have not opted out) with 21 days of this order. Pltfs and Deft are directed to jointly prepare a draft of proposed notice to class members and submit it to court for consideration. Cy to parties. rer
Nov. 26	96	ORDER (copy)—AWC—approving NOTICE TO CLASS MEMBERS. Mailed original to Attorney Eaton for further action. cb
Dec. 13	97	ORDER (ORIGINAL)—AWC—aproving NOTICE TO CLASS MEMBERS, & sample of Notice as mailed.
Dec. 13		MAILED NOTICE TO CLASS MEMBERS pursuant to order P#97. gww
Dec. 17	98	ADDRESS LIST (updated) for class members. Notices remailed 12-17-82 by GWW. rer
Dec. 22	99	ADDRESS LIST (updated) for class members. Notices remailed 12-17-82 by GWW. gww
1983		
Jan. 20	100	REQUESTS for exclusion from air class (attachments) as certified by Clerk. rer Mailed cy to attys.

Date	*NR*	*Proceedings*
Feb. 7	101	NOTICE OF APPEARANCE of John H. Chase, Assistant Atty General, for State of VT Depts. of Fish & Game and Forests, Parks and Recreation. jj
Feb. 28	102	REQUESTS for exclusion re Lawrence and Wanda Krause and Walter and Helen Welch with letter dated 2-21-83 from Atty Eaton addressing the question of late exclusions and situation as to Patricia Noll. rer
Mar. 8	103	MOTION & MEMO to allow appearance and to Strike Request for Exclusion by VT Atty General.
Mar. 8	104	AFFIDAVIT of John H. Chase. lgl
Mar. 24	105	ORDER—AWC—Upon consideration of P#103, it is hereby ORDERED: That said motion be granted. The appearance of the Atty General of the State of VT for the State of VT, Dept. of Forests and Parks, shall be allowed and the request for exclusion previously filed on behalf of the Dept of Forests and Parks shall be stricken. Cy to attys. jj
1984		
April 4	106	LETTER dated 4/2/84 in support of Deft International Paper Company's motion to dismiss pltfs' First Cause of Action. amn
April 9	107	LETTER dated 4/9/84 in RESPONSE by Pltfs. (re: P#106) cp

Date	*NR*	*Proceedings*
April 12	108	ORDER—AWC—Defts to have until 5-1-84 in which to file additional brief and Pltfs to have until 5-23-84 in which to file responsive briefs. Cy to parties. rer
May 1	109	MEMORANDUM, Supplemental, in support of Defts Motion to Dismiss Pltfs' First Cause of Action, P# 83. rer
May 21	110	MEMORANDUM, Supplemental, in Opposition to Motion to Dismiss by Pltfs re P#83. rer
June 1	111	LETTER dated 5/29/84 from Atty. James Benkard as a Reply Memorandum to Pltfs' Supplemental Memorandum. (Re: P#83 and 110) cab
Aug. 16	112	LETTER dated 8-14-84 from Atty. James Benkard—with attachments —in support of Motion to Dismiss, P# 83. rer
Nov. 26		In court before Judge Coffrin, hearing on defendant's motion to dismiss plaintiff's first cause of action. Peter Langrock, Esq., Susan Eaton, Esq. for plaintiff; John Chase, Esq. for the state; James Benkard, Esq., Jamie Stern, Esq. and Austin Hart, Esq. for defendant.
Nov. 26		Statements made by counsel.
Nov. 26		Taken under advisement. gc

Date	*NR*	*Proceedings*
1985		
Feb. 5	113	ORDER—AWC—Deft's motion to dismiss is denied. Cys to attys. cab
Feb. 19	114	MOTION for Certification pursuant to 28 U.S.C. § 1292(b) to amend Court's Order to permit an interlocutory appeal and For Stay with MEMORANDUM by Deft. (P#113) wf
Feb. 20	115	MEMORANDUM in SUPPORT by Deft. (P#114) wf
Mar. 5	116	MEMORANDUM in Opposition to Motion for Certification and Stay by Pltf. (P#114) wf
Mar. 14	117	MEMORANDUM (Reply) in support of Motion for Certification and Stay Deft (P#114). amn
April 3	118	APPEARANCE of Merideth Wright, Ass't Attorney General for State of Vermont, substituting for John H. Chase, Esq. rer STARTED FOLDER NO. 5
April 23	119	Plaintiff class member State of Vermont's position in opposition to defendant's motion for certification and stay. gc
May 6		In court before Judge Coffrin, hearing on defendant's motion for certificate pursuant to 28 U.S.C., Sec. 1292(b).

Date	*NR*	*Proceedings*
May 6		Statements made by Mr. Benkard.
May 6		Ordered: Motion granted; defendant to prepare a proposed order for Court's signature (to be reviewed by Plaintiffs' counsel).
May 6		Court suggests that defendant pursue the class certification of the air class. gc
May 20	120	ORDER—AWC—Granting Motion for Certification to permit an interlocutory appeal. Cy to attys. cp
June 3	121	NOTICE OF MOTION to Dismiss
June 3	122	MEMORANDUM in Support of Deft's. motion to Dismiss Pltf's. Second Cause of Action (P#121)
June 3	123	AFFIDAVIT of Allen Cawrse (P# 121) lf
June 11	124	MOTION for Extension of Time within which to Respond to P# 122 by pltfs. jj
June 11		ORDERED — AWC — Motion Granted. Pltfs to respond by 7/23/85. Cy to attys. jj
June 12	125	SUPPORTING MEMORANDUM of Pltfs (P# 124). rer
June 24	126	ORDER—2d. Cir. entered 6-18-85—Permission to Appeal pursuant to 28 USC § 1292(b) is granted. cb
June 24		Received $65 docketing fee for appeal from Dinse, Erdmann & Clapp.

Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

85 Civ. 7506

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE, EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf cf all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR. and LOIS T. PATTERSON,

Plaintiffs-Appellees,

—v—

INTERNATIONAL PAPER COMPANY,

Defendant-Appellant.

Date	*Filings—Proceedings*
05-28-85	Movant INTERNATIONAL PAPER COMPANY Notice of Motion for Lease to Appeal pursuant to 28 U.S.C. § 1292(b), filed.
05-28-85	Movant INTL. PAPER CO. memo of law in support of motion received.
05-28-85	Movant INTL. PAPER CO. Notice of Motion for permission to exceed page limitation in second circuit rule 27(a)(2)(b), filed.
05-29-85	Order granting the movants motion for permission to exceed pg. limit etc., filed. (By: ALK).

Date	*Filings—Proceedings*
05-29-85	Movant INTL. PAPER Co. memo of law in support of 1292b motion, filed.
05-31-85	Respondents HARMEL OUELLETTE *et al.* Answer to Movant's Petition for Permission to Appeal pursuant to 28 U.S.C. § 1292(b) filed (w/pfs) (all ccs to Calendar Unit).
06-05-85	Movant INTL. PAPER Co. Reply Memorandum in support of its motion for leave to appeal, filed. (orig & 3cc Calendaring).
06-18-85	Order granting the appellant INTERNATIONAL PAPER COMPANY Motion for leave to appeal. filed. (By: EAVG, GCP, & EDR, US Cit).
06-21-85	Certified copy of the order filed on 6-18-85 issued to the district court, Vermont.
06-26-85	Copy of receipt re: Payment of docketing fee in district court filed.
06-26-85	Appellant INTERNATIONAL PAPER COMPANY Form C (filed w/pfs).
06-26-85	Appellant INTERNATIONAL PAPER COMPANY Form D filed.
06-28-85	Scheduling Order No. 1, filed.
07-01-85	Copy of district court docket entries, filed.
07-17-85	Record on appeal original district court papers filed.
07-22-85	Appellant INTERNATIONAL PAPER COMPANY briefs filed w/pfs.
07-22-85	Appellant INTERNATIONAL PAPER COMPANY joint appendices filed w/pfs.
08-12-85	Appellee's HARMEL OUELLETTE and LILA OUELLETTE briefs filed (w/p/s).

Date	*Filings—Proceedings*
08-19-85	Movant Atty. General of the State of New York, *amicus curiae* motion for leave to file brief out of time and to participate in oral argument filed. (see order filed 8-23-85)
08-21-85	Appellant INTERNATIONAL PAPER motion for extension of time to file reply brief pursuant to FRAP w/pfs filed. See order filed 8/23/85. 14 days after 9/3.
08-21-85	Appellant INTERNATIONAL PAPER Co. memorandum in response to motion to file a amicus brief w/pfs filed. (see order filed 8-15-85)
08-23-85	Order granting appellant INTERNATIONAL PAPER Co. motion for cross-motion for extension of time to file reply brief pursuant to F.R.A.P. 26 b) filed.
08-23-85	Order granting *amicus curiae* Atty Gen. of the State of New York motion for leave to file *amicus curiae* out of time and INT'L PAPER is given 14 days thereafter to file its reply brief, filed.
08-04-85	Appellant INTERNATIONAL PAPER Co. reply brief filed (w/pfs).
09-01-85	Letter of State of Vermont adopting the points and arguments of appellee Ouellette brief filed.
10-17-85	Case heard before Kaufman, Pratt, Miner, C.JJ.
11-04-85	Judgment affirmed by published signed opinion per curiam.
11-04-85	Judgment filed.

Date	*Filings—Proceedings*
11-19-85	Appellee's HARMEL OUELLETTE and LILA OUELLETTE itemized and verified bill received (w/pfs) [federal expressed, per D.G.].
12-05-85	Mandate (judgment, opinion) issued to VT.
12-10-85	Appellees HARMEL OUELLETTE and LILA OUELLETTE statement of costs filed.
12-10-85	Certified copy of statement of costs issued with letter.
01-30-86	Notice of filing of petition for writ of certiorari, petitioner INTERNATIONAL PAPER COMPANY, Supreme Court docket No. 85-1233, filed.
03-27-86	Certified copy of order of Supreme Court granting petition for writ of certiorari, filed.
04-14-86	Certified original record and proceedings (District Court and US Court of Appeals sent to Supreme Court).

Summons

ADDISON SUPERIOR COURT

STATE OF VERMONT

ADDISON COUNTY, SS

Civil Action, Docket No. ———

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY

To the above named defendant(s):

You are hereby summoned and required to serve upon Peter F. Langrock, Esquire, plaintiff's attorney, whose address is Langrock Sperry Parker and Stahl, P.O. Drawer 351, Middlebury, Vermont 05753, in answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Your answer must be filed with the court. Unless the relief demanded in the complaint is for damage covered by a liability insurance policy under which the insurer has the right or obligation to conduct the defense, or unless otherwise provided in Rule 13(a), your answer must state as a

counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making

Dated: 3d June 1976

/s/ PETER F. LANGROCK, ESQUIRE

.....

Plaintiff's Attorney

Peter F. Langrock, Esquire

Served on 7-5-78

.....

(Date)

/s/ Signature Illegible

.....

Deputy Sheriff

Complaint

ADDISON SUPERIOR COURT

STATE OF VERMONT

ADDISON COUNTY

Docket No. ——

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY

COMPLAINT

NOW COME the Plaintiffs, HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated Plaintiffs, by and through their attorney, Peter F. Langrock, Esquire, of the law firm of Langrock Sperry Parker and Stahl, and complain as follows:

FIRST CAUSE OF ACTION

COUNT I

1. Plaintiffs Harmel Ouellette, Lila Ouellette, Clifton Browne, Edla Browne, Aldee Plouffe, Shirley Plouffe, are citizens of the Town of Bridport, County of Addison, State of Vermont.

2. Defendant is a corporation organized under the laws of the State of New York with its principal place of business

in the state of New York, and registered to do business in Vermont.

3. Plaintiffs bring this Count of this action on behalf of themselves and, under Rule 23 of the Vermont Rules of Civil Procedure, on behalf of all other Lake Champlain lakeshore landowners and lakeshore lessees similarly situated and located in the Towns of Shoreham, Bridport and Addison, County of Addison, State of Vermont; the said lakeshore landowners and lakeshore lessees in the Towns of Shoreham, Bridport and Addison number approximately 250 and it is therefore impracticable to bring them all before this Court.

4. There are questions of law and fact common to the entire class of lakeshore landowners and lakeshore lessees similarly situated and located in the Towns of Addison, Bridport and Shoreham; the claims of the plaintiffs herein are typical of the claims of the said class; and the plaintiffs will fairly and adequately protect the interests of and represent said class; the common questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

5. The Defendant, International Paper Company, operates and has operated a pulp and paper making plant approximately four miles north of the Village of Ticonderoga, New York.

6. At all times material hereto the Defendant, International Paper Company, has discharged pulp and paper making waste from said plant into Lake Champlain.

7. Said wastes exceed the capacity of Lake Champlain to assimilate them and are detrimental to the Lake, and its fish and plant life.

8. Said discharges are foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to Plaintiffs' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use.

9. Said discharges constitute a continuing nuisance to the Plaintiffs and other members of the class, and interfere with their use and enjoyment of their property and have diminished and will continue to diminish the fair market value and rental value of their property.

WHEREFORE, Plaintiffs, on behalf of themselves and other members of the Class, pray for judgment in the amount of TWENTY MILLION DOLLARS ($20,000,000.00), together with interest and costs and attorneys' fees, and for such other relief as this Court deems proper. Plaintiffs request trial by jury.

Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to relocate all water intakes on Lake Champlain (by which it draws water from Lake Champlain for use in said plant) to be in direct proximity with the opening of all discharge outlets on Lake Champlain from which it discharges wastes from its manufacturing operations that have been treated through its waste treatment system.

COUNT II

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 6 of Count I of the First Cause of Action.

2. On November 18, 1974, the Regional Administrator of the United States Environmental Protection Agency, Region II made a final determination pursuant to Section

402 of the Federal Water Pollution Control Act Amendments of 1972, 33 USC § 1342, to issue a National Pollutant Discharge Elimination System permit for the discharge of pollutants from the said plant into Lake Champlain (permit numbers NY 002 0036 and NY 000 4413), said permit to be effective on December 31, 1974. Said permit was later amended effective March 15, 1977.

3. Defendant, International Paper Company, has consistently, knowingly and deliberately violated the terms of this permit by discharging into Lake Champlain waste materials in excess of the amounts specified under the permit.

4. These discharges, in violation of the permit, exceed the capacity of Lake Champlain to assimilate them and are detrimental to the Lake and its fish and plant life. These discharges are foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to Plaintiffs' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use. Said discharges interfere with Plaintiffs' use and enjoyment of their property and have decreased the market value and rental value of their property.

WHEREFORE, Plaintiffs, on behalf of themselves and other members of the Class, pray for judgment in the amount of TWENTY MILLION DOLLARS ($20,000,000.00), together with interest and costs and attorneys' fees, and for such other relief as this Court deems proper. Plaintiffs request trial by jury.

Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to relocate all water intakes on Lake Champlain (by which it draws water from Lake Champlain for use in said plant) to be

in direct proximity with the opening of all discharge outlets on Lake Champlain from which it discharges wastes from its manufacturing operations that have been treated through its waste treatment system.

COUNT III

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 8 of Count I of the First Cause of Action.

2. The uses of the waters of Lake Champlain by the defendant as aforesaid are unreasonable and in violation of the rights of the Plaintiffs and other members of the class to the use of said waters as riparian owners.

3. The Defendant, as a proximate result of the aforesaid use, has damaged and permanently reduced the value of the riparian rights of the Plaintiffs and other members of the Class in that the Defendant has impaired the recreational value of the waters of Lake Champlain in, around, and adjacent to the lakeshore properties of the Plaintiffs and other members of the class, in that the Defendant has so polluted said waters that they are unfit for any reasonable use.

WHEREFORE, the Plaintiffs, on behalf of themselves and other members of the Class, pray for judgment against the Defendant in the amount of TWENTY MILLION DOLLARS ($20,000,000.00) together with interest and costs and attorneys' fees, and for such other relief as this Court deems proper. Plaintiffs request trial by jury.

Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to relocate all water intakes on Lake Champlain (by which it draws water from Lake Champlain for use in said plant) to be in direct proximity with the opening of all discharge outlets

on Lake Champlain from which it discharges wastes from its manufacturing operations that have been treated through its waste treatment system.

COUNT IV

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 5 of Count I of the First Cause of Action.

2. At all times material hereto, the Defendant, International Paper Company, in violation of its duty to other lakeshore property owners has negligently discharged pulp and paper making waste into Lake Champlain.

3. Said wastes exceed the capacity of Lake Champlain to assimilate them and are detrimental to the Lake and its fish and plant life.

4. Said discharges are foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to Plaintiffs' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use.

5. Said discharges interfere with Plaintiffs' use and enjoyment of their property and have diminished and will continue to diminish the fair market value and rental value of their property.

WHEREFORE, Plaintiffs, on behalf of themselves and other members of the Class, pray for judgment in the amount of TWENTY MILLION DOLLARS ($20,000,000.00), together with interest and costs and attorneys' fees, and for such other relief as this Court deems proper. Plaintiffs request trial by jury.

Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to relocate

all water intakes on Lake Champlain (by which it draws water from Lake Champlain for use in said plant) to be in direct proximity with the opening of all discharge outlets on Lake Champlain from which it discharges wastes from its manufacturing operations that have been treated through its waste treatment system.

COUNT V

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 9 of Count I, Paragraphs 2 through 4 of Count II, Paragraphs 2 through 3 of Count III and Paragraphs 2 through 5 of Count IV, of the First Cause of Action.

2. The Defendant had and has the means at its reasonable disposal of dealing with the waste and pollutants of its plant so as not to affect the interests of the Plaintiffs and other members of the class, but has failed and continues to fail to use such means.

3. Defendant deliberately located said plant on Lake Champlain, which plant became operational in 1971, knowing full well from its experience with its old plant, located in the Village of Ticonderoga, New York, that Lake Champlain is unable to assimilate said discharges.

4. The actions of the Defendant as set forth above were and are malicious, willful, and undertaken with reckless and wanton disregard of Plaintiffs' rights.

WHEREFORE, the Plaintiffs, on behalf of themselves and all members of the Class, pray that they be awarded punitive and exemplary damages in the amount of ONE HUNDRED MILLION DOLLARS ($100,000,000.00).

The Plaintiffs further pray that such sums as are awarded for such exemplary and punitive damages be set aside for the benefit of encouraging a pollution-free environment

in the area of Lake Champlain and its tributaries, under such terms and conditions as are set forth by this Court or, in the alternative, that such funds be distributed in equal amounts among the Class; and the Plaintiffs further pray that this matter be tried by jury.

Second Cause of Action

Count I

1. Plaintiffs Harmel Ouellette, Lila Ouellette, Clifton Browne, Edla Browne, Aldee Plouffe, Shirley Plouffe, are citizens of the Town of Bridport, County of Addison, State of Vermont.

2. Defendant is a corporation organized under the laws of the State of New York with its principal place of business in the state of New York, and registered to do business in Vermont.

3. Plaintiffs bring this Count of this action on behalf of themselves and, under Rule 23 of the Vermont Rules of Civil Procedure, on behalf of all other residents and property owners and lessees similarly situated and located in the Towns of Shoreham, Bridport, Addison, and Orwell, County of Addison, State of Vermont; the said residents, property owners, and lessees number approximately 3,150 and it is therefore impracticable to bring them all before the Court.

4. There are questions of law and fact common to the entire class of residents, property owners, and lessees located in the Towns of Addison, Bridport, Shoreham, Orwell; the claims of the Plaintiffs herein are typical of the claims of the said class; and the Plaintiffs will fairly and adequately protect the interest of and represent said class; the common questions of law and fact predominate over any questions affecting only individual members, and a class action is

superior to other available methods for the fair and efficient adjudication of this controversy.

5. At all times material hereto, the Defendant, International Paper Company, operates and has operated a pulp and paper making plant approximately four miles north of the Village of Ticonderoga, New York.

6. Said plant discharges, smoke, fumes and other discharges, which smoke, fumes and other discharges are foul, unhealthy, smelly, and aesthetically unpleasing. Said smoke and fumes travel across Lake Champlain to the Towns of Shoreham, Bridport, Addison and Orwell. The presence of said smoke and fumes and other discharges in Plaintiffs' town and in the towns of other members of the class, has impaired their health and that of their families and has diminished and will continue to diminish the fair market value and rental value of their property. Said smoke and fumes and other discharges constitute a nuisance, and interfere with Plaintiffs' and other class members' use and enjoyment of their property.

Wherefore, the Plaintiffs, on behalf of themselves and other members of the class, demand judgment against the Defendant in the amount of Sixty -Two Million Dollars ($62,000,000.00), together with interest and costs and attorneys' fees. Plaintiffs request trial by jury.

Count II

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 6 of Count I of the Second Cause of Action.

2. Defendant, International Paper Company, in violation of its duty to Plaintiffs and other members of the class, negligently discharges smoke and fumes and other discharges from said plant, which smoke and fumes and other

discharges are foul, unhealthy, smelly, and aesthetically unpleasing. Said smoke and fumes and other discharges travel across Lake Champlain to the Towns of Shoreham, Bridport, Addison and Orwell. The presence of said smoke and fumes in Plaintiffs' town and in the towns of other members of the class, has impaired their health and that of their families and has diminished and will continue to diminish the fair market value and rental value of their property. Said smoke and fumes and other discharges interfere with Plaintiffs' and other class members' use and enjoyment of their property.

WHEREFORE, the Plaintiffs, on behalf of themselves and other members of the class, demand judgment against the Defendant in the amount of SIXTY-TWO MILLION DOLLARS ($62,000,000.00), together with interest and costs and attorneys' fees. Plaintiffs request trial by jury.

COUNT III

1. Plaintiffs reallege and incorporate herein as though specifically set forth Paragraphs 1 through 6 of Count I and Paragraph 2 of Count II of the Second Cause of Action.

2. The Defendant had and has the means at its reasonable disposal of dealing with the smoke and fumes and other discharges of its plant so as to not affect the interests of the Plaintiffs and other members of the class, but it has failed and continues to fail to use such means.

3. The actions of the Defendant, as set forth above, are malicious, willful, and undertaken with reckless and wanton disregard of Plaintiffs' rights.

WHEREFORE, the Plaintiffs, on behalf of themselves and all members of the class, pray that they be awarded punitive and exemplary damages in the amount ONE HUNDRED MILLION DOLLARS ($100,000,000.00).

Plaintiffs further pray that such sums as are awarded for such exemplary and punitive damages be set aside for the benefit of encouraging a pollution free atmosphere in the Towns of Addison, Shoreham, Bridport, Orwell; or in the alternative that such funds be distributed in equal amounts among the members of the class.

Plaintiffs request trial by jury.

DATED at Middlebury, in the County of Addison and State of Vermont this 30th day of June, 1978.

LANGROCK SPERRY PARKER AND STAHL

By /s/ PETER F. LANGROCK, ESQUIRE

.....

Peter F. Langrock, Esquire
A Member of the Firm
P.O. Drawer 351
Middlebury, Vermont 05753

[Affidavit of Service omitted in printing]

Answer

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, Individually, on behalf of themselves, and on behalf of all similarly situated Plaintiffs,

Plaintiffs,

—against—

INTERNATIONAL PAPER COMPANY,

Defendant.

Defendant International Paper Company, by its attorneys Dinse, Allen & Erdmann, for its answer to the Complaint herein:

FIRST CAUSE OF ACTION

COUNT I

1. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1.

2. Admits paragraph 2.

3. Denies paragraph 3, except admits that the plaintiffs purport to bring this Count on behalf of the class of persons alleged therein.

4. Denies paragraph 4.

5. Admits paragraph 5.

6. Denies paragraph 6.

7. Denies paragraph 7.

8. Denies paragraph 8.

9. Denies paragraph 9.

COUNT II

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 6 to Count I of the First Cause of Action.

2. Admits paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

COUNT III

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 8 to Count I of the First Cause of Action.

2. Denies paragraph 2.

3. Denies paragraph 3.

COUNT IV

1. Answering paragraph 1. defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 8 to Count I of the First Cause of Action.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

5. Denies paragraph 5.

COUNT V

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 9 to Count I, paragraphs 2 through 4 to Count II, paragraphs 2 and 3 to Count III, and paragraphs 2 through 5 to Count IV of the First Cause of Action.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

SECOND CAUSE OF ACTON

COUNT I

1. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1.

2. Admits paragraph 2.

3. Denies paragraph 3, except admits that the plaintiffs purport to bring this Count on behalf of the class of persons alleged therein.

4. Denies paragraph 4.

5. Denies paragraph 5, except admits that defendant operates and has operated a pulp and paper making plant approximately four miles north of the Village of Ticonderoga, New York.

6. Denies paragraph 6.

COUNT II

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 6 of Count I of the Second Cause of Action.

2. Denies paragraph 2.

COUNT III

1. Answering paragraph 1, defendant repeats and incorporates herein, as though specifically set forth, the answers of paragraphs 1 through 6 of Count I and paragraph 2 to Count II of the Second Cause of Action.

2. Denies paragraph 2.

3. Denies paragraph 3.

FIRST AFFIRMATIVE DEFENSE

1. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

2. The claims set forth in the Complaint are barred in whole or in part by the statute of limitations.

THIRD AFFIRMATIVE DEFENSE

3. The claims set forth in the Complaint are barred in whole or in part by laches.

FOURTH AFFIRMATIVE DEFENSE

4. Plaintiffs lack standing to obtain the equitable relief prayed for.

FIFTH AFFIRMATIVE DEFENSE

5. Plaintiffs have failed to join persons needed for a just adjudication of the actions.

WHEREFORE, defendant International Paper Company demands judgment dismissing the Complaint herein, together with the costs and disbursements of this action, and such other relief as the Court may deem appropriate.

Dated: Burlington, Vermont
July 24, 1978

Dinse, Allen & Erdmann
186 College Street
Burlington, Vermont

By Illegible

. . . . . .

A Member of the Firm

Davis Polk & Wardwell
One Chase Manhattan Plaza
New York, New York

By Illegible

. . . . . .

A Member of the Firm

Attorneys for Defendant
International Paper Company

Robert McK. Hunziker, Esq.
International Paper Company

Of Counsel

Motion to Amend Complaint

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

CIVIL ACTION

File No. 78-163

HARMEL OUELLETTE, *et al.*

v.

INTERNATIONAL PAPER COMPANY

MOTION TO AMEND

NOW COME the Plaintiffs, by and through their attorney Susan F. Humphrey, of the law firm of Langrock Sperry Parker and Stahl, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, and request permission of this Court to amend their Complaint to add the following requested relief to Counts I, II and III of the Second Cause of Action:

> Plaintiffs further pray that the following equitable relief be granted: That this Court order Defendant to reduce the emissions of smoke, fumes and other discharges to a level whereby they do not travel across Lake Champlain and interfere with Plaintiffs' use and enjoyment of their property.

DATED at Middlebury, in the County of Addison and State of Vermont this 6th day of June, 1979.

LANGROCK SPERRY PARKER and STAHL

By . . . . . .
Susan F. Humphrey, Esquire
A Member of the Firm
Attorneys for Plaintiffs

Order Granting Plaintiff's Motion to Amend Complaint—Docket Entry

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

78 Civ. 163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, Individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY.

Date	*NR*	*Proceedings*
1980		
Apr. 7		In Court before Judge Coffrin, hearing on plaintiffs' motion to amend Complaint. Peter Langrock, Esq. and Susan Humphreys, Esq. for plaintiffs; Spencer Knapp, Esq. James W.B. Benkard, Esq., Robert M. Hunziker Esq. and Kevin Simmons Esq. for defendant.
Apr. 7		Ordered: Motion granted.

Opinion and Order

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civ. A. No. 78-163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, Individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY.

Peter F. Langrock and Susan Humphrey, Langrock, Sperry, Parker & Stahl, Middlebury, Vt., for plaintiffs.

John M. Dinse and Spencer Knapp, Dinse, Allen & Erdmann, Burlington, Vt., James W.B. Benkard, Robert M. Hunziker and Kevin Simmons, Davis, Polk & Wardwell, New York City, for defendant.

OPINION AND ORDER

COFFRIN, District Judge.

In this diversity action for damages and injunctive relief, plaintiffs have moved for certification of two plaintiff classes

pursuant to Fed. R. Civ. P. 23. The Complaint is styled in two "causes of action" and different classes are proposed for each. Defendant opposes certification of both proposed classes.

Facts

This action began on July 5, 1978, in Vermont's Addison County Superior Court and defendant properly removed it to this court on July 25, 1978. Following removal several of the presently named plaintiffs were permitted to intervene. This case is the latest expression of some Vermonters' unhappiness with the condition of Lake Champlain's waters. It represents a continuation of both private, *e.g.*, *Zahn* v. *International Paper Co.*, 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed.2d 511 (1973), and public efforts to impose liability on International Paper Company (IPC) for its discharges into Lake Champlain. *Vermont* v. *New York*, 406 U.S. 186, 92 S. Ct. 1603, 31 L. Ed.2d 785 (1972) (motion for leave to file bill of complaint granted), *dismissed*, 419 U.S. 955, 95 S. Ct. 246, 42 L. Ed.2d 260 (1974); *see* Note, *The Battle of Lake Champlain—Interstate Pollution and the Inadequacy of the Judicial Process*: *Vermont* v. *New York*, 1 Vt. L. Rev. 175 (1976).

Plaintiffs are Vermont residents who own property on or near the "south lake" area of Lake Champlain in the vicinity of the Crown Point Bridge; defendant is a New York corporation with its principal place of business in New York. It operates a paper mill near Ticonderoga, New York, across the south lake from plaintiffs' property. Jurisdiction is grounded on 28 U.S.C. § 1332(a).

Plaintiffs request certification of two classes which we will refer to as the "water class" and the "air class." The water class would consist of approximately 400 lakeshore property owners and lessees in the towns of Shoreham, Bridport and

Addison. Plaintiffs claim on behalf of this class that IPC's discharge of papermaking waste into Lake Champlain constitutes a nuisance that diminishes the value and interferes with the enjoyment of their property.

The air class would consist of approximately 3150 property owners, lessees and residents in Shoreham, Bridport, Addison and Orwell. On behalf of this class plaintiffs claim that the airborne discharges from defendant's paper mill travel across Lake Champlain and create a nuisance in the designated towns. In addition to diminished property value, plaintiffs claim this class has suffered impaired health as a result of defendant's alleged air pollution.[1]

On behalf of both proposed classes plaintiffs seek monetary damages and equitable relief ordering IPC to relocate the source of its water intake system closer to the source of its waste discharge system.

Discussion

To maintain this as a class action, plaintiffs must satisfy the four prerequisites of Fed. R. Civ. P. 23(a) and the two elements of the rule 23(b)(3) form of action they propose. We consider these separately below.

1. Prerequisites

We have no difficulty finding that the proposed classes are sufficiently numerous that joinder is impracticable, Fed. R. Civ. P. 23(a)(1), and that there are questions of law or fact common to the classes. *Id.* (a)(2). Although numbers alone do not determine impracticability of joinder, *see, e.g.*, *EWH* v. *Monarch Wine Co.*, 73 F.R.D. 131, 133

[1] At the hearing on plaintiffs' motion for class certification the argument of plaintiffs' counsel regarding the allegation in the complaint of impaired health was somewhat equivocal. The court did not understand, however, that the claim was being withdrawn.

(E.D.N.Y. 1977), and geographical distribution of a proposed class is of considerable importance, *Glover* v. *McMurray*, 361 F. Supp. 235, 241 (S.D.N.Y.), *rev'd and remanded on other grounds*, 487 F.2d 403 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 963, 94 S. Ct. 3166, 41 L. Ed.2d 1136 (1974), we are nevertheless persuaded by the numbers involved in the proposed classes. Defendant does not dispute plaintiffs' approximations of size—determined on the basis of information obtained from the respective Towns' Clerks and population reports in the *Vermont Year Book*—and we have found such numbers to be convincing in the past. *D. C.* v. *Surles*, No. 78-91 (D. Vt. December 6, 1978).

Similarly we are satisfied that there are questions of law and fact common to the classes. Plaintiffs seek redress for injuries allegedly caused by continuing acts of defendant. Central to the claims of all members of the proposed classes are the fact questions of the quality, amount and distribution of defendant's discharges and the legal questions of defendant's liability therefor. In addition, defendant may have defenses that would be common to the claims of all the class members. These questions are "shared in the grievances of the prospective class[es] as defined," 3B *Moore's Federal Practice* ¶ 23.06-1, at 23-173 (2d ed. 1979), and we conclude that the requirement of rule 23(a)(2) is also met in this case. Although in its argument concerning rule 23(b)(3) defendant opposes certification on the basis of rules 23(a)(1) and (2) its primary contention is that rules 23(a)(3) and (4) are not satisfied.

Rule 23(a)(3) requires that the proposed representative's claims be typical of the claims of the proposed class.

At least one commentator doubts that rule 23(a)(3) imposes a requirement of independent significance, 3B *Moore's Federal Practice* ¶ 23.06-2, at 23-185 (2d ed. 1979), but we are more inclined to agree with Judge Muir that we should not lightly conclude that a meaningless provision was promulgated. *In re Anthracite Coal Anti-trust Litigation*, 78 F.R.D. 709, 716 (M.D. Pa. 1978); *see, e. g.*, *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 269-70 (10th Cir. 1975) (rule 23(a)(3) requires comparison of plaintiff's claims with those of proposed class). We are satisfied, however, that a comparison of the named plaintiffs' claims with those of the proposed classes need not reveal identity to be "typical." "Factual variations are not fatal to a proposed class when the claims arise out of the same remedial and legal theory." *Wofford* v. *Safeway Stores, Inc.*, 78 F.R.D. 460, 488 (N.D. Cal. 1978). To be "typical," plaintiffs' claims must be "co-extensive with, and not inimical to, those of the proposed class," *Levine* v. *Berg*, 79 F.R.D. 95, 97 (S.D.N.Y. 1978), and they must not be subject to unique defenses that are inapplicable to other members of the proposed class. *Greenspan* v. *Brassler*, 78 F.R.D. 130, 132 (S.D.N.Y. 1978). The rough benchmark in this circuit apears to measure typicality by the likelihood that all members of the proposed class " 'will be helped' " if the would-be representatives establish their claim, *Gill* v. *Monroe County Department of Social Services*, 79 F.R.D. 316, 326 (W.D. N.Y. 1978) (quoting *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed.2d 732 (1974)), and the lack of adverse interests between the named plaintiffs and the proposed class members. *Women's Committee for Equal Employment Opportunity* v. *National Broadcasting Co.*, 71 F.R.D. 666, 670 (S.D.N.Y. 1976); *Cutner* v. *Fried*, 373 F. Supp. 4, 13 (S.D.N.Y. 1974).

Defendant, relying on its depositions of plaintiffs, argues that they do not all allege the same kinds of damage they claim on behalf of the classes they purport to represent.

According to defendant this proves as a matter of logic that plaintiffs' claims are not typical. But defendant appears to misapprehend the nature of rule 23(a)(3)'s requirement. Although the Advisory Committee's notes, Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 100 (1966), do little to illuminate this aspect of the rule, decisional law has made clear that whether or not it has independent significance the importance of the typicality requirement lies in assuring that the named plaintiffs will adequately represent those who are unnamed. *Rosado* v. *Wyman,* 322 F. Supp. 1173, 1193 (E.D.N.Y.), *aff'd* 437 F.2d 619 (2d Cir. 1970), *aff'd,* 402 U.S. 991, 91 S. Ct. 2169, 29 L. Ed.2d 157 (1971). Differences in the degree of harm suffered, or even in the ability to prove damages, *Sanders* v. *Faraday Laboratories, Inc.,* 82 F.R.D. 99, 101 (E.D.N.Y. 1979), do not vitiate the typicality of a representative's claims. Typicality, therefore, should be evaluated in terms of the plaintiffs' claims as to liability. *Id.,* cases cited therein.

With this in mind, we find the named plaintiffs' claims typical of the classes they seek to represent. Proof of defendant's liability for the alleged pollution of the air and Lake Champlain will benefit all members of the proposed classes, *Eisen;* that the damages, if any, may reach a de minimis level at some point among the class members does not make the named plaintiffs' claims atypical.

The last prerequisite of rule 23(a) is that the representatives must fairly and adequately protect the interests of the class. Of considerable importance to our finding on this issue is the compjetence of plaintiffs' counsel, *Eisen,* 391 F.2d at 562, which defendant concedes. We concur. Nevertheless, defendant contends that issues going to proof of damages will create antagonism among the class members making their representation by plaintiffs inadequate. This

contention is easily disposed of by noting that there is no necessity that all issues be tried in one proceeding. The class aspects may be tried before the individual damages claims, if that should prove necessary. *See In re Caesars Palace Securities Litigation,* 360 F. Supp. 366, 399 (S.D.N.Y. 1973) (individual questions of reliance and damages not fatal to class action charging securities violations); *Dolgow* v. *Anderson,* 43 F.R.D. 472, 490 (E.O.N.Y. 1968) (common issues need not dispose of entire litigation).

Thus we find that the proposed classes satisfy the prerequisites of rule 23(a).

2. Maintenance of 23(b)(3) action.

Defendant's most strenuous objection to certification of these classes relates to the rule 23(b)(3) elements. To maintain an action under subdivision (b)(3), plaintiffs must demonstrate, and the court must find, that common questions of fact of law predominate and that a class action is superior to other methods available for fair and efficient adjudication of the controversy. Defendant contends that neither of these characteristics obtains in this case.

Defendant's contentions also go to the heart of an emerging and important question concerning the propriety of class action as a procedure for redressing environmental injury. This question has lurked in the background of the few decisions we have found involving claims similar to those of the instant case, but it has not been addressed directly, so far as we have been able to determine. In cases of this kind the allegedly harmful discharges are released into the environment in a concentrated state at a source. They disperse thereafter in a manner dictated by natural forces, and their effect, if any, on the surrounding environment is necessarily a function of proximity to the source and prevailing natural conditions. Because of this, no two property owners at random points in an affected area are likely to urge the

same pattern of dispersion. Defendant points this out and argues from it that plaintiffs' claims are therefore atypical and that plaintiffs are unable because of their individual interests to protect fairly and adequately the interests of the class. This assertion reduces itself inexorably to the proposition that a class action may never proceed against an alleged polluter; defendant's [illegible] would almost invariably disqualify each would-be [illegible]mber from representing the proposed class. Therefore, before proceeding with our analysis of subdivision (b)(3), we feel constrained to respond to defendant's assertion and examine the general proposition to which it leads.

The function of subdivision (b)(3) is to reach the group of cases for which class treatment would be inappropriate under the (b)(1) or (b)(2) categories but would be convenient and desirable nevertheless. In the Advisory Committee's words, subdivision (b)(3) was intended for "those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Proposed Amendments, 39 F.R.D. at 102-03.

The Advisory Committee felt that some categories of cases, mass accidents for instance, would be inappropriate for class action because of the likelihood of individual questions of liability and defenses to liability. *Id.* at 103. The same might be true of certain kinds of private damage antitrust cases. *Id.* We find the Committee's inclusive language more descriptive of the kind of case presently before us than its exclusive language. We have not found a case to suggest the contrary. We conclude that as a genre the instant case is not inappropriate for class treatment and we reject the implication of defendant's argument. As a theoretical matter, we find, for instance, that it would be

desirable from the standpoint of consistency and convenience to develop in a single proceeding the quantum, quality and dispersion pattern of a source's discharges. Time, effort and expense might be saved by such a procedure, even though all issues may not be resolvable at once. In separate trials the questions of fact respecting defendant's discharges and their dispersion might be resolved inconsistently, contrary to sense and logic. Similar inconsistency could arise with separately determined questions of liability or defenses to liability, and this would be undesirable as a matter of "uniformity of decision as to persons similarly situated." *Id.* In our opinion the type of suit represented by this case is not the sort envisioned by the Advisory Committee as generally inappropriate for class treatment under subdivision (b)(3). *See also* Weinstein, *Some Reflections on the "Abusiveness" of Class Actions,* 58 F.R.D. 299, 305 (suggesting the propriety of class action in the area of environmental control). There are fundamental differences between the case plaintiffs bring and the "mass accident" case that concerned the Advisory Committee, which we will discuss below. But what is important at this point in our discussion is that the Advisory Committee felt the considerations of rule 23(b)(3) were fatal to class treatment of a "mass accident," whereas defendant in effect is urging that the considerations of rule 23(a) are fatal to class treatment of the instant sort of case. We have found no support for such a conclusion in law or logic, and we find it contrary to the thinking behind rule 23.

It remains, then, for us to consider whether the instant case satisfies the two requirements of subdivision (b)(3).

Predominance of Common Questions of Law and Fact

Defendant's position is that the differences among the proposed classes' members do not relate merely to the

damages each claims, but go to the issue of IPC's liability for the claimed damages. In defendant's view this is a case in which liability is a separate issue as to each member of the proposed classes, which makes individual questions predominate over the common ones. The cases that it cites in support of this contention are mostly cases where the actual definition of the proposed class depended on individual findings of liability. In *Pendleton* v. *Trans Union Systems Corp.*, 76 F.R.D. 192 (E.D. Pa. 1977), the court denied certification of a class of consumers who were denied credit because of errors in the defendant's credit reports. The court observed that because there could be no liability without an erroneous or inaccurate credit report it would not be possible to establish liability as to an entire class without resolving separate questions about individual reports. This was not a case such as *Biechele* v. *Norfolk & Western Railway Co.*, 309 F. Supp. 354 (N.D. Ohio 1969), where in the *Pendleton* court's opinion, "geographic limitations defined the class in such a way that the Court could conclude that all of the plaintiffs were injured in various respects and to various extents by the defendant's operations." *Pendleton*, 76 F.R.D. at 195.

Yandle v. *PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) is to the same effect. The plaintiffs sought certification of a class of former employees and survivors of former employees allegedly suffering illness and death from exposure to asbestos in the defendant's plant. The court denied certification because among the class there were varying periods of exposure to varying concentrations of asbestos; some may have had pre-existing illnesses; and individual questions existed as to the availability and use of safety devices, and the availability of affirmative defenses such as the statute of limitations. In short, the uncommon questions bearing on the defendant's liability at

all to each class member were predominant. Viewed another way, this was a case where, as in *Pendleton*, the class of those to whom the defendant would be liable could not be defined without separate trials on the liability issues.

In *Boring* v. *Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D. Pa.), *appeal dismissed*, 505 F.2d 729 (3d Cir. 1974), residents of York County, Pennsylvania, sought to maintain a class action for damages and injunctive relief against two defendant corporations whose operations released contaminants into the air. The court denied class certification, observing that the only common fact alleged by the claims of the proposed class was that their damages were caused by the same source. *Id.* at 84. The variety of types of damage alleged made a single finding of liability impossible in a single mass proceeding. *Id.* at 85.

Unlike these and the "mass accident" cases defendant cites, the water class in the present case offers a geographically discrete group asserting theoretically consistent claims as to which individual defenses to liability do not appear. Identical evidence would be required in each individual's case to determine whether IPC pollutes Lake Champlain and is liable to lakeshore owners and lessees whose property values and enjoyment, including recreational use, are diminished thereby. *See Hernandez* v. *Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975) (class treatment of defendant's negligence in supplying contaminated food and water for cruise passengers' consumption); *American Trading and Production Corporation* v. *Fischbach & Moore, Inc.*, 17 F.R.D. 155 (N.D. Ill. 1969) (class treatment of defendant's negligent handling of electrical wiring in exhibition hall resulting in fire damage to exhibitors' goods). Moreover, the water class in this case differs fundamentally from the "mass tort" class that the Advisory Committee considered inappropriate

for certification: there are no personal injuries claimed and there are no individual defenses asserted. *See* Judge Steger's discussion in *Yandle*, 65 F.R.D. at 569.

We find that in a class treatment of the facts respecting IPC's discharges and its liability for diminished property value and enjoyment of use caused thereby, common questions will predominate.

We do not, however, find that this is so as to the entire proposed water class. The Town of Addison fronts on a lake that is markedly different from that which meets the Towns of Bridport and Shoreham. Addison lies north of the Crown Point Bridge in an area known locally as the "broad lake," which is deeper and composed of water that is of a generally different quality than that of the "south lake" where Bridport and Shoreham are located. In addition, none of the proposed class representatives resides in Addison, which raises doubts about the adequacy of Addison residents' representation. We conclude, therefore that a water class comprised of all three towns' lakeshore property owners would be inappropriate. Thus we limit our final conclusions about the propriety of a water class to those proposed class members residing in Shoreham and Bridport.

The proposed air class presents a somewhat different picture. This class is more like that proposed and denied in *Boring*, where the "nature of the differing injuries runs the gamut from damage to fee simple and leasehold interests in real estate to damaged personalty, unpleasant surroundings and . . . compensable personal injury." *Boring*, 63 F.R.D. at 84-85. Defendant would no doubt offer separate defenses to the claims of impaired health, and such claims are likely to be the kind that individuals have an interest in prosecuting s parately. Fed. R. Civ. P. 23(b)(3)(A). *See Yandle*, 65 F.R.D. at 572 ("[M]embers of the purported class have a vital interest in controlling their own litigation because it

involves serious personal injuries . . . ."). There is no " 'common nucleus of operative facts,' " *Eisen*, 391 F.2d at 566 (citing *Siegel* v. *Chicken Delight Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967)), that unites the liability claims of this proposed class as there is in the water class. Whereas the pollution of the lake may uniformly limit the enjoyment and decrease the value of all lakeshore property because the lake is a common source of recreation, the same may not be said of air pollution's effect on the inland property. For instance, unpleasant odors may not affect the value of a dairy farm, if at all, in the way they would a strictly residential area. The various uses to which property is put in the area of the proposed air class makes class treatment of property damage claims as inappropriate as class treatment of health impairment claims. We find that common questions of law and fact will not predominate in a class treatment of the air class's claims and we therefore deny certification of the air class.

Superiority of Class Action

We have considered the matters pertinent to our findings under subdivision (b)(3), Fed. R. Civ. P. 23(b)(3)(A)-(D), and the alternative methods for handling this litigation, and we find that class treatment of the water class's claims would be superior. The claims are not such that class members would be interested in individual prosecution, we are aware of no litigation currently under way that involves this controversy, the desirability of uniform decisions respecting the class's claims counsels for concentrating the claims in a single forum, and the proposed class presents no management difficulties as the class is finite and easily identifiable. The alternatives of joinder and intervention do not offer the simplicity and conclusiveness of proceeding with these claims as a class action. IPC may offer its

defenses in one forum at one time and, if successful, can put an end to this kind of litigation over the polluting effects of its discharges. The class members can pool their resources, present their most effective case in one proceeding and share the benefits if they succeed.

We conclude that the water class, as limited, meets the requirements of rule 23 and certify the lakeshore owners in the Towns of Bridport and Shoreham as a class to maintain this suit.

3. Notice

Rule 23(c)(2) requires that the court direct to the class members the best notice practicable under the circumstances. This includes individual notice to those members who can be identified through reasonable effort. It appears that the class members in this case can be identified rather easily through town records, and we direct plaintiffs to determine who the individual class members are within twenty-one days from the date of this order. Within the same period, plaintiffs and defendant are directed to prepare jointly a draft of a proposed notice to the class members and submit it to the court for its consideration. SO ORDERED.

Dated at Burlington in the District of Vermont, this twenty fourth day of April, 1980.

/s/ ALBERT W. COFFRIN

.....

Albert W. Coffrin
Chief Judge

Notice of Motion to Dismiss

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action—File No. 78-163

HARMEL OUELLETTE, et al.

v.

INTERNATIONAL PAPER COMPANY

NOW COMES Defendant International Paper Company by and through their attorneys, Dinse, Allen & Erdmann, and pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure, move this Court for an order dismissing plaintiffs' First Cause of Action.

Dated: Burlington, Vermont
June 22, 1981

DINSE, ALLEN & ERDMAN, ESQS.
209 Battery Street
Burlington, Vermont

BY: /s/ JOHN M. DINSE

.....

A Member of the Firm

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BY: /s/ JAMES W.B. BENKARD
.....
A Member of the Firm

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International Paper
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Affidavit of Dana B. Dolloff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
Civil Action—File No. 78-163

HARMEL OUELLETTE, et al.

v.

INTERNATIONAL PAPER COMPANY

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANA B. DOLLOFF, being duly sworn, deposes and says:

1. For approximately sixteen years, I have been an employee of defendant International Paper Company ("IPCo.") and I make this affidavit in support of IPCo.'s motion to dismiss the First Cause of Action stated in this lawsuit.

2. From 1969 to 1972, I served as Supervisor of Air and Water Management for IPCo.'s operations in and around Ticonderoga, New York. From 1967 until 1972, I was involved in the design, construction, and initial operation of IPCo.'s paper mill located approximately three miles north of the Village of Ticonderoga. Thereafter, I was transferred to the corporate environmental staff of IPCo. at its headquarters in New York City, where I was Coordinator of Air/Water Programs. As Coordinator, I participated extensively in the continuing operations of the Ticonderoga Mill, including assisting in IPCo.'s defense

in the trial of *Vermont* v. *New York and International Paper Company* (Original Number 50, United States Supreme Court). When that suit terminated in 1974, I continued to have extensive contacts with the Ticonderoga Mill and, in particular, I was one of IPCo.'s representatives in the negotiations with the various state and federal agencies concerning that Mill which culminated in the issuance of a National Pollutant Discharge Elimination System permit in 1977. Set forth below is a chronology of the judicial and administrative proceedings involving the Ticonderoga Mill between 1970 and 1977.

The Supreme Court Action

3. In December 1970, the State of Vermont instituted an action in the United States Supreme Court against the State of New York and International Paper Company. The claims made and the relief sought in the original complaint related only to the discharges of another paper mill (the "Old Mill") owned and operated by IPCo. in the Village of Ticonderoga itself. That Mill had ceased operations prior to the institution of the Supreme Court case and IPCo. had already undertaken the construction of a new mill, three miles to the north of the Village of Ticonderoga. (It is the new mill which is the subject of this action.) The Supreme Court accepted the jurisdiction of the Vermont suit in 1972 and appointed a Special Master, R. Ammi Cutter, to hear the matter. The motion of the United States to intervene was granted; the Environmental Protection Agency ("EPA") joined the proceedings and participated throughout the ensuing trial and settlement negotiations.

4. Prior to trial, Vermont amended its complaint to add claims relating to the new mill, alleging that its air and water discharge constituted a nuisance and a trespass.

The Settlement Agreement

5. After nearly a year of trial, settlement negotiations commenced. The negotiations lasted several months and, on September 23, 1974 the parties reached an agreement which was subsequently approved by the Supreme Court (by granting a consensual motion to dismiss the complaint). A copy of the Stipulation and Order of Dismissal is attached hereto as Exhibit A. While disposing of Vermont's claims concerning the Old Mill, the settlement also stipulated that IPCo. would make further improvements to the new mill including increased air pollution control equipment and would accept limitations on the amount of certain substances that could be included in its liquid discharge to the southern portion of Lake Champlain (the "South Lake").

6. By way of information, the standard method of stating a limitation on the discharge of a particular substance in an effluent, is to prescribe a given limit on the amount of milligrams of the substance that may be allowed per liter of effluent (mg/1). That limitation is then converted into a daily poundage limit by multiplying the concentration by the average daily discharge in total gallons, or liters, of the effluent using appropriate conversion factors. Occasionally, the concentration standard (mg/1) is included as an additional, or alternative, limitation.

7. The settlement with Vermont provided that the amount of biochemical oxygen demand ("BOD") in the effluent should not exceed 4400 pounds per day as a monthly average* and the amount of phosphorus should not exceed a concentration of 0.5 mg/1 as a monthly average or 88 pounds per day as a monthly average, which-

---

* This limitation, which was already in the New York State permit under which IPCo. operated at that time, computes to approximately 25 mg/1.

ever was more restrictive. These limitations were agreed to by both the EPA and New York.

8. The agreement did not resolve all the issues between the parties concerning the content and nature of the liquid discharge from the new mill and the parties recognized that questions would be dealt with by "action of regulatory or executive agencies of the United States or the State of New York in the performance of their official duties." Exhibit A, Agreement of Settlement between The State of Vermont And International Paper Company, Article IV(H), at 000686-87. Among other obligations, IPCo. agreed to permit representatives of Vermont to make visits to the mill, inspect its facilities, interview its personnel, and take samples from the treatment system. *Id.*, II(G)(1) at 000677. The Company also agreed to provide Vermont with copies of all regular reports concerning its discharges that IPCo. submitted to the State of New York or the EPA. *Id.*, II(G)(4) at 000678.

Proceedings Involving The Issuance Of An NPDES Permit

9. Prior to the approval by the Supreme Court of the Settlement Agreement, the EPA took over the permitting process from New York State and, on May 15, 1974 issued to the mill a "draft" National Pollutant Discharge Elimination System (NPDES) permit pursuant to the Federal Water Pollution Control Act Amendments of 1972. Prior to that time, IPCo. had been operating under a permit issued by the New York State Department of Environmental Conservation.

10. The draft permit included a wide variety of limitations and standards, many of which were based upon regulations, promulgated by the EPA, incorporating effluent

limitations for all similar mills. The draft permit consisted of 26 pages and included: detailed limitations and prohibitions relating to discharges of various substances in the effluent; the manner of measuring for those substances; a schedule for compliance; methods of testing; instructions for reporting to the EPA; and directions for reporting and explaining instances of non-compliance, among other matters.* In accordance with the Settlement Agreement, the draft permit incorporated the limitations agreed upon by IPCo. and Vermont involving the discharge of biochemical oxygen demand and phosphorus.

11. As an "affected" state, Vermont received notice of the draft permit and responded in writing, stating 14 separate "conditions" that it demanded the permit included. IPCo. also submitted its comments and EPA subsequently circulated a revised permit on November 29, 1974.

12. On December 9, 1974, IPCo. formally requested an adjudicatory hearing concerning the need for or appropriateness of a number of the limitations and standards set forth in the most recent draft of the permit. Provisions of the permit not challenged by IPCo. became effective on January 27, 1975. EPA granted IPCo.'s request for an adjudicatory hearing and, thereafter, Vermont, New York and the Lake Champlain Committee (the principal private environmental organization in the Champlain Valley with a membership at that time of more than 2000) requested and were granted status as parties to the hearing.

13. While the parties had raised a number of issues for the hearing, the predominant question concerned the existing and proposed limitations upon the allowable amount of suspended solids in the discharge from the mill. The draft

* A copy of the final permit is attached hereto as Exhibit B.

permit specified an "interim" limitation on suspended solids —applicable until July 1, 1977—of 32,000 pounds a day as a daily average with a daily maximum of 48,000 pounds. As of July 1, 1977, the statutory deadline for application of standards based upon "best practicable treatment", the draft permit required that the daily average discharge of suspended solids be no greater than 6800 pounds, with a daily maximum of 16,320. IPCo. had no objection to the interim limitation as the mill's daily average discharge of suspended solids between 1974-1977 was approximately 17,000 pounds, or well under the 32,000 pound limit. IPCo. did object to the proposed 1977 standard, which was based upon the application to the mill of EPA's published (but still tentative) "Interim Effluent Guidance" applicable to all bleached kraft paper mills. The paper industry, including IPCo., contended that those effluent guidelines were unreasonably stringent and could not be achieved by best practical treatment. Vermont, on the other hand, took the position that the final standard should be enforced at 6800 pounds.

14. During 1975, representatives of all the parties attended a pre-hearing conference and, thereafter, IPCo. made available to Vermont, New York and EPA extensive information on its waste water treatment system. IPCo. also offered to meet whatever standard would result from application of the *Final* Effluent Guidelines (whenever they were finally promulgated) to the mill. Nevertheless, a settlement was not reached on the solids issue and in May, 1976 EPA informed the parties that an adjudicatory hearing would have to be held.

15. By the summer of 1976, the suspended solids standard in the EPA Interim Guidelines controlling July 1, 1977 standards for bleached kraft mills had been substantially relaxed. Application of those guidelines to the Ticonderoga

Mill would have allowed a daily average discharge of over 16,000 pounds per day as an average. On August 10, 1976, however, the New York Department of Environmental Conservation certified the southern part of Lake Champlain as "water quality limited". This designation allowed the regulatory agencies to impose a stricter standard upon the Ticonderoga Mill than would pertain to other mills discharging into non-water quality limited bodies of water. Representatives of New York, EPA, and Vermont consulted and came to the conclusion that a limitation of 10,000 pounds per day of suspended solids should be required for the Ticonderoga Mill discharge as of July 1, 1977. Hence, the suspended solids limits (as well as BOD, for that matter) would be based on both the state and federal agency determinations of discharge levels appropriate to protect the water quality of Lake Champlain.

16. At the instance of IPCo., the parties met again to try and reach a settlement of the solids issue which would obviate the need for a hearing. At this time, IPCo. was achieving an average daily discharge of approximately 14,000 pounds of suspended solids—thereby already bettering the standard (16,000 pounds) which would not apply to the industry until the following year. IPCo.'s experts and consultants reached the view, however, that the existing system, which required the addition of $700,000 a year in chemicals (chiefly alum) to enhance removal of solids, was not capable of achieving the 10,000 pounds standard on a regular basis. Thus, IPCo. proposed a radical solution: the installation of a $3,000,000 addition to its waste water treatment system consisting of two large reactor-type clarifiers with associated equipment. With these improvements, it was anticipated that the waste water treatment system could meet a standard of 10,000 pounds.

17. The proposed time schedule for design and construction of this addition called for a one-year pilot study from October 1976 to October 1977 and two years for engineering and construction, running from October 1977 to October 1979. As IPCo. informed the parties to the proceeding, the pilot plant tests (the results of which would define the design of the system) could only be meaningful if the chemical (alum) addition to the treatment system was suspended for the duration of the pilot program. With the agreement of all parties, these tests commenced in October 1976, even before approval of the proposed settlement.

18. On November 23, 1976, all parties met at the New York Department of Environmental Conservation in Albany, New York to resolve the remaining issues concerning the NPDES permit for the new mill. At this meeting, the following agreement was reached: IPCo. would operate under an interim standard of 32,000 pounds of suspended solids as its daily average until July 1, 1977; from July 1, 1977, until the completion of construction of the new system (in 1979), the standard would be 17,000 pounds; and thereafter the standard would go down to 10,000 pounds. Once the parties reached a consensus on this point, the remaining issues were resolved swiftly.

EPA Issues An Environmental Compliance Schedule Letter

19. Because EPA took the position that it did not have the statutory authority to grant an extension of compliance with the 10,000 pound standard after July 1, 1977, the final permit provided that, notwithstanding the agreement among the parties, IPCo. would be required to meet the 10,000 pound standard as of July 1, 1977. As this would be impossible until completion of the tertiary system (not scheduled until 1979), IPCo. requested, and EPA subsequently issued with the concurrence of all parties (including Vermont), an Environmental Compliance Schedule Letter (ECSL). A copy of the ECSL is attached hereto as Exhibit C. This document contains a qualified commitment by EPA that it will not seek sanctions for technical violations of the suspended solids limitations in the permit after July 1, 1977 so long as IPCo. is undertaking good-faith efforts, pursuant to the program, to construct a facility which will enable it to meet the standards at issue.

20. On March 15, 1977, representatives of all parties met in New York for the formal signing of the stipulation embodying the parties settlement of the adjudicatory hearing which resulted in the issuance of a final permit issued to IPCo. High representatives of the state government of Vermont and New York attended as did senior officials from EPA. The ECSL was issued and the permit, as revised, became fully effective.

EPA Institutes Administrative Proceedings

21. As IPCo. had forewarned the parties, once it ceased the addition of alum to its waste water system in order that the pilot plant tests could be meaningful, the suspended solids, and, subsequently, the BOD readings in the discharge to the South Lake increased substantially. Before the system returned to equilibrium, there were violations of the interim standards set forth in the permit during the winter months of 1976-1977. On April 15, 1977 the EPA instituted an administrative proceeding by issuing "Findings of Violation and Order to Show Cause" seeking sanctions against IPCo. for the violations mentioned above.

22. IPCo. responded by noting that the violations were the inevitable result of necessary testing for the system that would achieve the rigid standards agreed to by the parties.

Settlement of EPA Proceeding

23. Representatives of all interested parties met in New York on May 6, 1977 to discuss the issue. Thereafter, on July 15, 1977, IPCo. and EPA settled the proceeding. In consideration of the dismissal of the proceeding and waiver of any monetary penalties, IPCo. agreed to reintroduce alum into the system (at an approximate cost of $60,000) on September 1, 1977 instead of October 1, 1977 (the end of the 12-month period originally contemplated as necessary for the pilot program).

24. Pursuant to the above Settlement Agreement between the parties, the daily average limitation dropped from 32,000 pounds to 17,150 pounds on September 1, 1977. IPCo. completed construction of the improvements to the waste water treatment system in October 1979, whereupon the limitation of 10,000 pounds took effect.

25. Having duly qualified under the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976) as a permit granting agency, New York State now administers the permit under the supervision of the EPA. Regular monthly reports on the performance of the waste water treatment system are sent to New York, EPA, and Vermont.

The Mill's Complicance With
The NPDES Permit

26. During the seven years of extensive regulation, negotiation, and technical innovations, the IPCo. mill has operated successfully under a permit incorporating discharge standards substantially more restrictive than those pertaining to any comparable mill in the country. Since October 1979, when the tertiary treatment system was in

operation, the mill's effluent has exceeded the BOD limit on one day (in December 1980) and the suspended solids limit on one day (in March 1980); pH was outside the permit limits for portions of four days (in February and March 1980 and February and March 1981) while the phosphate limit has not been exceeded.

/s/ DANA B. DOLLOFF

. . . . . .

Dana B. Dolloff

Sworn to before me this
22nd day of June, 1981.

(Signature Illegible)

. . . . . .

Exhibit A to Dolloff Affidavit

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973
No. 50 Original

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,
Plaintiff,

v.

STATE OF NEW YORK, a sovereign state,
Albany, New York

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,
Defendants.

UNITED STATES OF AMERICA,
Intervenor.

STIPULATION AND ORDER OF DISMISSAL

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 29, 1974

Hon. Kimberly B. Cheney
Attorney General of Vermont
Pavilion Office Bldg.
Montpelier, Vermont 05602

RE: Vermont v. New York et al., No. 50 Original

Dear Mr. Cheney:

Enclosed is a certified copy of the stipulation to dismiss the bill of complaint and order of dismissal, pursuant to Rule 60 in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By Name Illegible

.....

(Mrs.) Evelyn R. Limstrong
Assistant

Enclosure

cc: Louis J. Lefkowitz, Esq. (w/encl)
Atty. General of N.Y.
2 World Trade Center
New York, N. Y. 10047

Taggart Whipple, Esq. (w/encl)
1 Chase Manhattan Plaza
New York, N. Y. 10005
Hon. Robert H. Bork (w/encl)

IN THE
SUPREME COURT OF THE UNITED STATES
No. 50, ORIGINAL

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,
Plaintiff,

v.

STATE OF NEW YORK, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,
Defendants.

UNITED STATES OF AMERICA.
Intervenor.

STIPULATION FOR DISMISSAL

It is hereby stipulated and agreed, by and between the attorneys of record for the respective parties hereto, that the amended complaint in this case be dismissed without prejudice pursuant to Rule 60 of the Rules of this Court. The parties have also reached agreement with respect to the payment of costs incurred in this case, as reflected in their joint Petition For An Order With Respect To Fee And Expenses Of Special Master, which is being filed with the Court concurrently with this Stipulation For Dismissal.

Dated: September 23, 1974

Respectfully submitted,

STATE OF VERMONT	STATE OF NEW YORK
/s/ KIMBERLY B. CHENEY	/s/ LOUIS J. LEFKOWITZ
Kimberly B. Cheney Attorney General of Vermont Pavilion Office Building Montpelier, Vermont 05602	Louis J. Lefkowitz Attorney General of New York 2 World Trade Center New York, N. Y. 10047
Attorney for Plaintiff State of Vermont	Attorney for Defendant State of New York
INTERNATIONAL PAPER COMPANY	UNITED STATES OF AMERICA
/s/ TAGGART WHIPPLE	/s/ ROBERT H. BORK
Taggart Whipple DAVIS POLK & WARDWELL 1 Chase Manhattan Plaza New York, New York 10005	Robert H. Bork Solicitor General of the United States Department of Justice Washington, D.C. 20530
Attorney for Defendant International Paper Company	Attorney for Intervenor United States of America

1974—October 29. The foregoing stipulation to dismiss the bill of complaint having been received by the Clerk

and no fees due, the bill of complaint is now here dismissed, pursuant to Rule 60 of this Court.

MICHAEL RODAK, JR.

.....

Clerk of the Supreme Court of the United States

(SEAL)

By /s/ FRANCIS J. LORSON
Deputy

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States

By /s/ FRANCIS J. LORSON

.....

Deputy

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

October 29, 1974

Hon. Kimberly B. Cheney
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vt. 05602

RE: VERMONT v. NEW YORK,
50 Original

Dear Sir:

The Court today entered the following order in the above-entitled case:

It is ordered by this Court that the Honorable R. Ammi Cutter be, and he is hereby, awarded the sum of $50,000 as compensation for his services as Special Master in this case, and that his disbursements totaling $5,150 be allowed. It is further ordered that the fee and disbursements be paid by the parties in the following amounts: $20,000 by the State of Vermont and $35,150 by the International Paper Company.

It is further ordered that the Special Master is hereby discharged.

cc: Hon. Louis J. Lefkowitz
Atty. Gen. of New York

Taggart Whipple, Esq.
DAVIS, POLK & WARDWELL

Very truly yours,

Hon. Robert H. Bork
Solicitor General of U.S.

MICHAEL RODAK, JR.,
Clerk

Hon. R. Ammi Cutter
Special Master in 50 Original
62 Sparks St.
Cambridge, Mass 02138

By

/s/ HELEN TAYLOR
.....
Helen Taylor, (Mrs.)
Assistant Clerk

September 23, 1974

Mr. Michael Rodak, Jr.
Clerk

Supreme Court of the United States
Washington, D.C. 20543

RE: STATE OF VERMONT v. STATE OF NEW YORK, et al.
No. 50 Original

Dear Mr. Rodak:

In Part II of its June 3, 1974 Opinion in the above case, the Court suggested that settlement of this case might be achieved by agreement of the parties and that "such a settlement might be the basis for a motion to dismiss the complaint. Cf. 32., Orig., *Missouri* v. *Nebraska*, decided May 28, 1974, U.S. ."

Such an agreement has now been reached, which will not involve any continuing supervision by the Court with respect to this matter. This agreement is embodied in two "Agreements of Settlement", copies of which are enclosed.

The parties therefore respectfully submit the enclosed Stipulation For Dismissal of this case pursuant to Rule 60 of the Rules of the Court, along with a separate Stipulation Concerning Transcript And Exhibits.

The parties have also reached agreement with respect to the payment of costs incurred in this case. This agreement is embodied in the parties' joint Petition For An Order With Respect To Fee And Expenses Of Special Master, which is being filed concurrently with the Stipulation For Dismissal.

Thank you for your attention in this matter.

Yours truly,

/s/ KIMBERLY B. CHENEY	/s/ LOUIS J. LEFKOWITZ
Kimberly B. Cheney Attorney General of Vermont Pavilion Office Building Montpelier, Vermont 05602 Attorney for Plaintiff State of Vermont	Louis J. Lefkowitz Attorney General of New York 2 World Trade Center New York, N. Y. 10047 Attorney for Defendant State of New York
/s/ TAGGART WHIPPLE	/s/ ROBERT H. BORK
Taggart Whipple DAVIS POLK & WARDWELL 1 Chase Manhattan Plaza New York, New York 10005 Attorney for Defendant International Paper Company	Robert H. Bork Solicitor General of the United States Department of Justice Washington, D.C. 20530 Attorney for Intervenor United States of America

IN THE
SUPREME COURT OF THE UNITED STATES
No. 50, ORIGINAL
October Term, 1974

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,
Plaintiff,

v.

STATE OF VERMONT, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,
Defendants.

UNITED STATES OF AMERICA,
Intervenor.

PETITION FOR AN ORDER WITH RESPECT TO FEE AND EXPENSES OF SPECIAL MASTER

STATE OF VERMONT

Kimberly B. Cheney
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

Attorney for Plaintiff
State of Vermont

STATE OF NEW YORK

Louis J. Lefkowitz
Attorney General of New York
2 World Trade Center
New York, N. Y. 10047

Attorney for Defendant
State of New York

INTERNATIONAL PAPER COMPANY

Taggart Whipple
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attorney for Defendant
International Paper Company

UNITED STATES OF AMERICA

Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Attorney for Intervenor
United States of America

IN THE
SUPREME COURT OF THE UNITED STATES
No. 50, ORIGINAL
October Term, 1974

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,

Plaintiff,

v.

STATE OF NEW YORK, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

UNITED STATES OF AMERICA,

Intervenor.

PETITION FOR AN ORDER WITH RESPECT TO FEE AND EXPENSES OF SPECIAL MASTER

WHEREAS, the parties hereto have settled this case by agreement and moved to dismiss the amended complaint in this case pursuant to Rule 60 of the Rules of this Court; and

WHEREAS, there being no further necessity or occasion for the services of Hon. R. Ammi Cutter, appointed by the Court as Special Master in this case; and

WHEREAS, the parties have been authorized by Hon. R. Ammi Cutter to state that he has read and has no objection with respect to this Petition:

NOW, THEREFORE, the parties hereto respectfully petition the Court to enter an order with respect to the fee and expenses of Hon. R. Ammi Cutter, appointed by the Court as Special Master in this case, on the following terms:

> The fee to be awarded Hon. R. Ammi Cutter as compensation for his services as Special Master in this case shall be in the amount of Fifty Thousand Dollars ($50,000). This amount shall be paid as follows: Twenty Thousand Dollars ($20,000) by the State of Vermont and Thirty Thousand Dollars ($30,000) by International Paper Company.
>
> The actual expenses of Hon. R. Ammi Cutter incurred in connection with his services as Special Master in this case, totaling Five Thousand One Hundred Fifty Dollars ($5,150), are allowed. This amount shall be paid by International Paper Company.

Dated: September 23, 1974

Respectfully submitted,

STATE OF VERMONT

/s/ KIMBERLY B. CHENEY

Kimberly B. Cheney
Attorney General of Vermont

Pavilion Office Building
Montpelier, Vermont 05602
Attorney for Plaintiff
State of Vermont

STATE OF NEW YORK

/s/ LOUIS J. LEFKOWITZ

Louis J. Lefkowitz
Attorney General of New York
2 World Trade Center
New York, N. Y. 10047
Attorney for Defendant
State of New York

INTERNATIONAL PAPER COMPANY

/s/ TAGGART WHIPPLE

Taggart Whipple
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attorney for Defendant
International Paper
Company

UNITED STATES OF AMERICA

/s/ ROBERT H. BORK

Robert H. Bork
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Attorney for Intervenor
United States of
America

IN THE
SUUPREME COURT OF THE UNITED STATES
No. 50, ORIGINAL

STATE OF VERMONT, a soveriegn state,
Montpelier, Vermont,
Plaintiff,

v.

STATE OF VERMONT, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

UNITED STATES OF AMERICA,
Intervenor.

STIPULATION CONCERNING TRANSCRIPT AND EXHIBITS

It is hereby stipulated and agreed, by and between the attorneys of record for the respective parties hereto, as follows:

1. One copy of the transcript of the testimony in No. 50, Original, together with a compilation of all requests for transcript corrections made to the court stenographer prior to November 1, 1974, shall be preserved and maintained as a public record by the State of Vermont.

2. Prior to November 1, 1974, the parties shall file with the Clerk of the United States Supreme Court a stipulation listing the exhibits received in evidence in No. 50, Original and stating which party shall maintain custody of each such exhibit.

Dated: September 23, 1974

Respectfully submitted,

STATE OF VERMONT

/s/ KIMBERLY B. CHENEY

Kimberly B. Cheney
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

Attorney for Plaintiff
State of Vermont

STATE OF NEW YORK

/s/ LOUIS J. LEFKOWITZ

Louis J. Lefkowitz
Attorney General of New York
2 World Trade Center
New York, N. Y. 10047

Attorney for Defendant
State of New York

INTERNATIONAL PAPER COMPANY

/s/ TAGGART WHIPPLE

Taggart Whipple
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attorney for Defendant
International Paper Company

UNITED STATES OF AMERICA

/s/ ROBERT H. BORK

Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Attorney for Intervenor
United States of America

AGREEMENT OF SETTLEMENT

BETWEEN

THE STATE OF VERMONT

AND

INTERNATIONAL PAPER COMPANY

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AGREEMENT OF SETTLEMENT

BETWEEN

THE STATE OF VERMONT

AND

INTERNATIONAL PAPER COMPANY

AGREEMENT, made this 23rd day of September, 1974 between the State of Vermont and International Paper Company;

WHEREAS, by *per curiam* Opinion, dated June 3, 1974, the Supreme Court of the United States declined to approve a proposed consent decree signed on April 24, 1974 by counsel for each of the parties (including the intervenor) in *Vermont* v. *New York et al.*, No. 50, Original, for reasons more fully stated in the Opinion;

WHEREAS, the Court in Part II of that Opinion stated:

> "A settlement of this interstate dispute by agreement of the parties is another alternative. Once a consensus is reached there is no reason, absent a conflict with an interstate compact, why such a settlement would not be binding. And such a settlement might be the basis for a motion to dismiss the complaint. Cf. 32 Orig., *Missouri* v. *Nebraska*, decided May 28, 1974, U.S. ."

WHEREAS, all parties to No. 50, Original desire to settle that action in the manner suggested in the above-quoted language of the Court's Opinion and to file a Motion to Dismiss without prejudice the amended complaint in No. 50, Original on the basis of the settlement set forth, in part, in this Agreement; and

WHEREAS, all parties to No. 50, Original have, contemporaneously with the execution of this Agreement by the State of Vermont and International Paper Company, executed a separate agreement upon which the Motion to Dismiss will also be based;

NOW, THEREFORE, the State of Vermont and International Paper Company (hereinafter collectively referred to as the "parties" to this Agreement) hereby stipulate and agree that this Agreement may be filed with the Clerk of the Supreme Court of the United States as the basis, in part, for a Motion to Dismiss the amended complaint in No. 50, Original. In the event that the Motion to Dismiss the amended complaint in No. 50, Original is not granted, this Agreement, the Appendix annexed hereto, and accompanying documents executed in connection with this Agreement shall be of no effect whatsoever in No. 50, Original or any other litigation, proceeding, or otherwise, and the making of this Agreement, the Appendix annexed hereto, and accompanying documents shall not in any manner prejudice any consenting signatory in No. 50, Original or any other litigation, proceeding, or otherwise. This Agreement shall constitute a contract in settlement of No. 50, Original but shall not constitute an adjudication or finding on any issue of fact or law, or evidence or admission by any party with respect to any such issue raised therein. In consideration of the mutual rights and obligations herein set forth, the following provisions are agreed to and accepted by the parties and shall be binding upon them respectively.

I. *Definitions*

Whenever used or referred to in this Agreement, unless a different meaning appears clearly from the context:

(A) "The Company" means International Paper Company, a New York corporation, having its principal office at 220 East 42nd Street, New York, New York, and its successors and assigns, including any person, corporation, or other entity that succeeds to the business of International Paper Company;

(B) "Agreement" means this Agreement executed and consented to by the parties, including the Schedules and any amendments made from time to time, but does not include the document annexed hereto and marked as Appendix A;

(C) "BOD_5" means the five-day biochemical oxygen demand of the process waste water effluent, as measured by method No. 219 set forth at pages 489, et seq., of *Standard Methods for the Examination of Water and Wastewater* (13th ed.), or any other method agreed upon by the parties;

(D) "Daily arithmetic average" means the result obtained by (1) calculating the area under the curve generated by an automatic recording device for a period of twenty-four hours and dividing that area by the time span considered, or (2) any other equally accurate method of computation;

(E) "Federal Water Pollution Control Act" means Public Law No. 92-500, 86 Stat. 816, as heretofore amended;

(F) "New Mill" means the land, buildings, equipment, and materials, including any additions or modifications thereto, at the manufacturing and waste treatment system sites owned and used by the Company and located approximately four miles north of the Village of Ticonderoga, New York;

(G) "Old Mill" means the land, buildings, equipment, and materials, including any additions or modifications thereto, located in the Village of Ticonderoga, New York, owned and formerly operated as a kraft pulp and paper mill by the Company, but does not include the dam and certain contiguous property specified in Chapter 675 of the Laws of 1973 of the State of New York;

(H) "Process waste water effluent" means any water that comes into direct contact with, or results from the production or use of, any raw material, intermediate product, finished product, byproduct, or waste product during manufacturing or processing, as discharged to South Lake Champlain from the New Mill;

(I) "South Lake Champlain" means that portion of Lake Champlain extending from Whitehall, New York to the Lake Champlain Bridge near Crown Point, New York;

(J) "Thermal oxidation" means the process of raising the temperature of a gas stream to 1500°F. or more, with a residence time of one-half a second or more;

(K) "Total phosphorus (as P)" means all of the phosphorus present in the process waste water effluent; and

(L) "Twenty-four hour composite sample" means a sample collected over a continuous 24-hour period, consisting of not less than twelve individual samples of equal volume taken at two-hour intervals during the 24 hours of sampling.

II. *Obligations of the Company*

(A) With respect to the Old Mill, the Company, and any person, corporation, or other entity that acquires ownership or control of, or a recordable interest in, the Old Mill, shall continue hereafter to refrain and desist from all discharges of process and sanitary waste water and air emissions originating from the Old Mill, except discharges and emissions receiving the necessary approvals from federal, State of New York, and local authorities. The Company shall not be liable, however, for any actions in which it has not participated and which are taken in contravention of the terms of this paragraph if the person, corporation, or other entity taking such actions has actual or constructive notice of this paragraph. This paragraph shall be set forth or incorporated by reference in any deed, lease, or other recordable instrument of conveyance of the Old Mill, and in any agreement whereby there is a change of ownership or control of the Old Mill, and shall be cast as a restrictive covenant running with the land.

(B) It shall take such actions with respect to the bark pile (located on the north shore of Ticonderoga Creek approximately one-half mile northeast of the Old Mill) as are provided in Schedule 2.

(C) It shall take such actions with respect to New Mill air emissions as are provided in Schedule 3.

(D) It shall take such actions with respect to New Mill water discharge as are provided in Schedule 4.

(E) With respect to the New Mill, the Company, and any person, corporation, or other entity that acquires ownership or control of, or a recordable interest in, the New Mill, shall set forth or incorporate

by reference the provisions of this Agreement applicable to the New Mill in any deed, lease, or other recordable instrument of conveyance of the New Mill, and in any agreement whereby there is a change of ownership or control of the New Mill, and such provisions shall be cast as restrictive covenants running with the land. The Company shall not be liable, however, for any actions which contravene the provisions of this Agreement applicable to the New Mill and in which it has not participated if the person, corporation, or other entity taking such actions has actual or constructive notice of such provisions.

(F) Within 60 days after the entry of an order dismissing the amended complaint in No. 50, Original, the Company shall pay to the State of Vermont the sum of $500,000. This money shall be paid by the Company and received by the State of Vermont as a contribution by the Company to the State of Vermont, to be used in the future solely for the purpose of protecting and preserving the natural environment of the Lake Champlain basin, and shall be maintained by the State of Vermont in a segregated account for this express purpose; provided, however, that the State of Vermont shall have sole discretion as to the manner in which the contribution is to be used for the foregoing purpose. This contribution shall not create a trust.

(G) The Company shall:

(1) permit official representatives of the State of Vermont, at reasonable times, on reasonable notice, and in a reasonable manner, to inspect and take samples from the pollution control facilities at the New Mill and to inspect and copy records

related thereto that are not privileged, and to interview the persons responsible therefor, in order to determine the effectiveness of operation of such facilities;

(2) take appropriate steps to inform its directors and responsible officers of the contents of this Agreement and Appendix A annexed hereto;

(3) provide expanded technical training and instructional courses (including refresher courses where appropriate) for all personnel engaged in the operation of the pollution control facilities at the New Mill, and provide instructional memoranda and bulletins with respect to the proper operation of such facilities; and

(4) provide to the State of Vermont: (a) a copy of each report with respect to process waste water effluent and air emissions from the New Mill that the Company regularly submits to the State of New York or to the United States, at the same time that it submits such reports to the State of New York or the United States, and (b) a monthly summary of process waste water effluent data, in the same format and containing the same information that has been supplied to the parties during No. 50, Original, by the last day of the month following that month for which the summary has been compiled.

III. *Obligations of the State of Vermont*

(A)(1) Within 60 days after the entry of an order dismissing the amended complaint in No. 50, Original, Vermont shall deliver to the Company a separate, executed copy of the document annexed hereto as

Appendix A. The parties agree that Appendix A shall be construed and take effect as a covenant not to sue at common law in that: (a) it shall prevent the State of Vermont from proceeding against the Company in any manner or respect specified in Appendix A, and (b) it shall not have the effect of barring, diminishing, or affecting in any way any legal or equitable rights or claims, actions, suits, causes of action, or demands that the State of Vermont may have against the State of New York or any person other than the Company, except as the enforcement of the same may be precluded by subparagraph (2) of this paragraph. The parties agree not to assert in any litigation or proceeding or otherwise that Appendix A has any effect other than as stated in this subparagraph.

(2) Notwithstanding any provision of Appendix A or any reservation by the State of Vermont made therein and notwithstanding the fact that No. 50, Original is to be dismissed without prejudice, the State of Vermont shall not seek to recover from any party to No. 50, Original damages for harm to the South Lake, its waters, shores, adjacent areas, and the atmosphere above and near it, allegedly suffered on or prior to the entry of an order dismissing the amended complaint in No. 50, Original for which the State of Vermont could have sought recovery in No. 50, Original.

(B) The State of Vermont shall make available to the Company for inspection and copying, at the Company's expense, all financial records relating directly or indirectly to the contribution referred to in Article II(F) of this Agreement.

(C) The State of Vermont shall:

(1) submit to the Company by April 15 of each year, a written report describing the activities and studies relating to the natural environment of the South Lake Champlain basin that are contemplated to be undertaken by or for its Department of Water Resources during the following period of May 1—November 30;

(2) submit to the Company by February 15 of each following year, a written report describing all the activities and studies relating to the natural environment of the South Lake Champlain basin actually undertaken by or for its Department of Water Resources during the preceding period of May 1—November 30; and

(3) make available to the Company upon request, for inspection and copying of any documents, not privileged, relating in whole or in part to the activities and studies referred to in subparagraphs (1) and (2) of this paragraph.

(D) The State of Vermont shall:

(1) study and recommend control of septic tank, sewer, agricultural, and other discharges within the Vermont portion of the South Lake Champlain basin;

(2) study and recommend the enactment of legislation or the promulgation of regulations concerning the use of detergents in Vermont;

(3) submit annually to the Company a written report describing its activities undertaken pursuant to subparagraphs (1) and (2) of this paragraph; and

(4) make available to the Company, upon request, for inspection and copying, any documents, not privileged, relating in whole or in part to its activities undertaken pursuant to subparagraphs (1) and (2) of this paragraph.

(E) The State of Vermont shall take such steps as are necessary to inform the appropriate members of the Vermont State Government (including, without limitation, the appropriate officials of the Vermont Agency of Environmental Conservation) of the contents of this Agreement and Appendix A annexed hereto.

(F) Subject to the relief available pursuant to Section 1.5(b) of Schedule 1 of this Agreement and only with respect to the specific limitations in Sections 3.4 and 3.5 of Schedule 3 and Section 4.1 of Schedule 4:

(1) prior to January 1, 1983, the State of Vermont shall not propose or support any proposal that more stringent limitations than those set forth in Sections 3.4 and 3.5 of Schedule 3 and Section 4.1(b) of Schedule 4 be included in any permit issued or to be issued to the Company with respect to the New Mill; provided, however, that in the event that the Company at any time prior to January 1, 1983, proposes or supports any proposal that any limitation referred to in this subparagraph be made less stringent, the State of Vermont's obligations under this subparagraph shall not apply with respect to that limitation only; and

(2) prior to June 1, 1979, or the commencement of any administrative action with respect to the second National Pollutant Discharge Elimination

System (hereinafter referred to as the NPDES) permit to be issued to the Company with respect to the New Mill, whichever is earlier, the State of Vermont shall not propose or support any proposal that a more stringent limitation than that set forth in Section 4.1(a) of Schedule 4 be included in any permit issued or to be issued to the Company with respect to the New Mill; provided, however, that in the event that the Company at any time prior to June 1, 1979, proposes or supports any proposal that the limitation referred to in this subparagraph be made less stringent, the State of Vermont's obligation under this subparagraph shall not apply.

(G) The State of Vermont shall monitor, on a regular basis and in a scientifically acceptable manner, the water quality in that part of Lake Champlain from Chipman Point to the Lake Champlain Bridge near Crown Point, New York, and shall make the results of such monitoring available to the Company for inspection and copying upon reasonable request.

IV. *General Provisions*

(A) The provisions of this Agreement shall be applicable and limited to the activities of the Company at the Old and New Mills and shall not be construed as applicable to, or in any way providing a precedent with respect to, any other mill, installation, facility, or location.

(B) Subject to the provisions of Articles III(A)(2) and III(F), nothing herein (including, but not limited, to the emission and effluent limitations prescribed in Schedule 3 and Schedule 4 of this Agreement) shall be construed to affect the authority, if any,

of any regulatory or law enforcement authority with lawful jurisdiction:

(1) to regulate waste water discharges or air emissions from the Old Mill and the New Mill;

(2) to seek to abate the effects of such discharges or emissions; or

(3) to take such actions as are authorized by law to accomplish these ends (including, but not limited to, sampling at, or inspection of, the New Mill and the Old Mill).

(C) The provisions of this Agreement shall not be construed as, nor shall they operate as, an admission that the Company has or has not violated any law or regulation or otherwise committed a breach of duty at any time, and shall not constitute, in No. 50, Original or any other litigation or proceeding or otherwise, evidence or any implication of any such violation or breach of duty.

(D) Any testimony taken or any exhibit received in evidence in No. 50, Original shall be received in evidence, if otherwise relevant and admissible, in any hearing or proceeding between or among the parties and neither party shall object to the introduction of such testimony or exhibit on the ground that the offering party has failed to produce the witness to testify with respect to such testimony or to authenticate such exhibit. The parties, however, reserve their rights, if any, to move to strike all or any portion of any testimony taken and all or any portion of any exhibit received in evidence in No. 50, Original.

(E) Either party may file this Agreement for recording in the appropriate land records pertaining to the Old and New Mills.

(F) Nothing herein shall be construed as affecting any claims or rights of any citizens or residents of the State of Vermont that may exist against any party to No. 50, Original.

(G) The provisions of this Agreement shall apply to the New Mill as long as it exists, regardless of who owns or operates the New Mill.

(H) This Agreement does not resolve certain issues or claims raised by the pleadings in No. 50, Original. This is so in part because such issues or claims are likely to be dealt with by action of regulatory or executive agencies of the United States or the State of New York in the performance of their official duties. This Agreement shall not be construed as determinative of any such unresolved issues or claims. Claims disposed of in Appendix A annexed hereto and those covered by Article III(A)(2) of this Agreement shall be regarded as resolved by this Agreement.

(I) If any provision of Article V or Schedule 1 of this Agreement is held by any court to be invalid or unenforceable, the validity and the enforceability of the remaining provisions of Article V, Schedule 1 and the rest of this Agreement shall not be affected thereby, and the rights and obligations of the parties shall be construed and enforced as if this Agreement did not contain the particular provision or provisions held to be invalid or unenforceable.

(J) The parties may waive any of the provisions of this Agreement by joint written agreement.

V. *Resolution of Issues Which May Arise Under this Agreement*

(A) The parties recognize that certain issues may arise during the existence of this Agreement concern-

ing the construction, enforcement, modification (including, but not limited to, relief from), or termination of any of the provisions of this Agreement. In order to expedite the resolution of any such issues, the parties agree to submit these issues to binding arbitration, in the manner and form set forth in Schedule 1 of this Agreement. The parties further agree that all applications for: construction of any provision; enforcement of any obligation; modification of any provision; or termination of any provision of this Agreement shall be made only in accordance with Schedule 1 of this Agreement.

(B) Except as otherwise expressly set forth in Schedule 1, any application by any party for modification or termination of any provision of this Agreement may be granted only upon a clear showing that it is supported by: (a) conditions substantially changed from those existing on the date of entry of an order dismissing the amended complaint in No. 50, Original, or (b) conditions not reasonably detectable on that date, or (c) strong equitable considerations arising thereafter.

SCHEDULE 1

THE SOUTH LAKE REFEREE AND THE APPEAL BOARD

SECTION 1.1

(a) Within 90 days after the entry of an order dismissing the amended complaint in No. 50, Original, the parties shall confer and endeavor to agree upon a person to serve as South Lake Referee. The South Lake Referee shall be a lawyer. If agreement cannot be reached within that time, application may be made by any party to the President of the American Arbitration Association for the appointment of the South Lake Referee pursuant to the Rules of the Association.

(b) The South Lake Referee shall serve a term of three years, and, upon the consent of the parties, may serve one or more additional terms of three years. If the South Lake Referee declines to serve an additional term, or if any party withholds its consent to his reappointment as South Lake Referee, the parties promptly shall confer and endeavor to agree upon another individual to serve as South Lake Referee. If an agreement cannot be reached within 45 days from the date the South Lake Referee declines to serve another term, or from the date that consent to his reappointment as South Lake Referee is withheld by either party, the successor shall be designated by a majority vote of the Appeal Board. If the Appeal Board cannot agree upon the successor within 45 days from the time the matter is referred to it, the Chairman of the Appeal Board shall designate the succcessor.

(c) In the event that the South Lake Referee dies, resigns, or is otherwise unable to perform his duties as South Lake Referee, the parties promptly shall confer and endeavor to agree upon a successor. If agreement cannot be reached within 45 days from the date that both parties receive notice of the death, resignation or disability of the South Lake Referee, the successor shall be designated by a majority vote of the Appeal Board. If the Appeal Board cannot agree upon the successor within 45 days from the date the matter is referred to it, the Chairman of the Appeal Board shall designate the successor.

(d) Subject to the provisions of Section 1.2(b) of this Schedule, the South Lake Referee, in performing his duties pursuant to this Agreement, shall have the same power and authority as an arbitrator acting pursuant to federal law, or if that is inapplicable, New York law, and also the authority to take such other actions as are set forth in this Schedule. Unless waived by the parties, final decisions of

the South Lake Referee shall be based upon written findings of fact and, if appropriate, conclusions of law. Such decisions, if appealed, shall be reviewable by the Appeal Board according to the standard set forth in Section 1.2(b) below.

SECTION 1.2

(a) The Appeal Board shall consist of three independent persons, one of whom shall be designated by the State of Vermont and one by the Company. Each member of the Appeal Board shall be a lawyer. Such designations shall be made within 90 days from the entry of an order dismissing the amended complaint in No. 50, Original. Each party shall at all time be entitled to have one designee on the Appeal Board. In the event, however, that one party fails to designate a member of the Appeal Board and a matter is referred to the Appeal Board, the Chairman and the other member of the Appeal Board shall designate a person to serve as the second member. The third member and Chairman of the Appeal Board, who shall be its presiding officer, shall be the Honorable R. Ammi Cutter, heretofore the Special Master in No. 50, Original. The term of the Chairman shall be three years. At the end of any three-year term, if the parties consent and the Chairman is willing, he shall be reappointed for an additional term of three years. In the event that the Chairman dies, resigns, is not reappointed, or is otherwise unable to perform his duties, the parties shall confer promptly and endeavor to agree upon a successor Chairman. If an agreement cannot be reached within 45 days from the date that both parties receive notice of the death, resignation or disability of the Chairman, the successor Chairman shall be designated by the remaining members of the Appeal Board. If the remaining members of the Appeal Board cannot agree upon

the successor Chairman within 45 days from the time the matter is referred to them, the successor Chairman shall be designated, upon application by either party, by the President of the American Arbitration Association pursuant to the Rules of the Association.

(b) The Appeal Board shall hear and determine appeals from decisions of the South Lake Referee with respect to applications made to him by any party to this Agreement pursuant to Article V and Schedule 1 of this Agreement. The Appeal Board shall affirm any decision made by the South Lake Referee if such decision is supported by substantial evidence viewed on the record as a whole.

(c) A decision of the Appeal Board shall be made by a majority of its members, or by the unanimous vote of the Board. Such a decision shall be considered an award of arbitration and shall be given the same weight and effect as an arbitration award pursuant to federal law, or if that is inapplicable, New York law. The award of arbitration may be confirmed, and a judgment entered upon the confirmation, in any court of competent jurisdiction.

SECTION 1.3

(a) If any party desires to raise a matter pursuant to the provisions of Article V of this Agreement, the parties shall confer promptly among themselves and, if appropriate, with regulatory officials or boards, or other persons, in an effort to resolve the matter.

(b) In the event that the parties are unable to resolve by conference any matter under this Agreement that is also subject to the lawful jurisdiction of the United States Environmental Protection Agency or the New York State Department of Environmental Conservation, or both, the party seeking relief shall, upon notice to the other party,

make application to, and exhaust its administrative remedies (excluding appellate review) before, such regulatory agency or agencies in accordance with the requirements of applicable law and regulations. The party seeking relief, upon notice to the other party, may make application to the South Lake Referee for a waiver of the obligations set forth in this subparagraph and the South Lake Referee may grant the application upon a showing that the performance of those obligations is not necessary and appropriate.

(c) In the event that the parties are unable to resolve any such matter after exhaustion of the procedures set forth in subparagraphs (a) and (b) of this Section, within 30 days thereafter any party may make written application to the South Lake Referee pursuant to Article V for the purpose of resolving the matter. The application shall be served by certified mail upon the other party and shall set forth the nature of the matter, the specific action requested, and the reasons alleged why the application should be granted. Upon receipt of the application, the party in opposition to the application shall serve responding papers within 30 days. Thereafter, the South Lake Referee may require a conference between the parties, or, if he deems it necessary, a hearing on the matter. Such conference or hearing may be held at any reasonable time and place specified by the South Lake Referee.

SECTION 1.4

In any hearing held pursuant to Section 1.3(c) of this Schedule, any party may introduce testimony or exhibits, subject to evidentiary rulings by the South Lake Referee. All witnesses shall be sworn and subject to cross-examination. At the request of any party, a transcript shall be made of the hearing. The parties shall have the right to submit, and the South Lake Referee may require the submission of, briefs or memoranda.

SECTION 1.5

Subject to review by the Appeal Board, the South Lake Referee may take the following types of actions:

(a) He may grant, for good cause shown, reasonable temporary exemptions from, and reasonable extensions of time (not exceeding six months on any one application) for, the performance of any act or the compliance with any standard required by this Agreement. In granting any such exemptions or extensions, he may impose appropriate terms and conditions. In acting under this subparagraph, he shall take into account (among other relevant matters) whether there has existed or occurred:

(1) timely receipt by the applicant of all federal, state, and local permits required for all actions necessary to comply with this Agreement;

(2) reasonable availability from others of the services, materials, equipment, or supplies required for the construction, modification, or operation of facilities necessary to comply with this Agreement;

(3) the passage of a reasonable period of time required for the construction, modification, and operation of such facilities; or

(4) any event, such as an act of God, war, strike, flood, riot, catastrophe, or any other similar event beyond the control of the applicant which has affected the ability of the applicant to comply with this Agreement.

(b) Notwithstanding compliance by the Company with the provisions of Schedule 3 of this Agreement, if, after November 1, 1975, objectionable odors attributable to the New Mill are detected in the State of Vermont during a significant period of time, he may order other or further action or relief.

(c) If there is, after the date of this Agreement, a change in the Consent Order relating to New Mill air emissions executed by the Company and the New York State Department of Environmental Conservation or in any NPDES permit issued to the Company with respect to the New Mill, he may order modification of this Agreement as appropriate in light of the change in the Consent Order or the permit, pursuant to the standards set forth in Article V(B) of this Agreement.

(d) He may order modification or termination of any provision of this Agreement pursuant to the standards set forth in Article V(B) of this Agreement.

(e) He may construe or interpret any provision of this Agreement upon a showing by any party that such provision is ambiguous or reasonably susceptible of conflicting interpretations.

(f) If it is alleged in an application to the South Lake Referee that there has been a breach of any provision of this Agreement, he may render a decision on the application, including the ordering of relief, equitable or legal.

SECTION 1.6

In addition to the State of Vermont's rights under Article II(G)(1) of this Agreement, the State of Vermont may apply to the South Lake Referee for an order permitting its official representatives to inspect the Old Mill or the New Mill, and the South Lake Referee may direct the Company to permit inspection of the Old Mill or the New Mill, with or without notice to the Company, if, after hearing, reasonable notice of which has been given to the Company, the South Lake Referee determines that good cause has been shown for such an inspection.

SECTION 1.7

As promptly as practicable after the conclusion of any hearing and the submission of briefs and memoranda, the South Lake Referee shall inform the parties in writing of his decision. Unless any party appeals a decision of the South Lake Referee to the Appeal Board within 30 days after receipt of such decision, it shall be considered an award of arbitration and shall be given the same weight and effect as a decision of the Appeal Board pursuant to Section 1.2(c) of this Schedule.

SECTION 1.8

In connection with any appeal from a decision of the South Lake Referee, the parties shall have the right to submit briefs and memoranda. The Appeal Board may require the parties to submit briefs and memoranda, and, if appropriate, to present oral argument. Thereafter, by written decision the Appeal Board may affirm, modify, or reverse the decision of the South Lake Referee, or remand the matter to the South Lake Referee for such action as the Appeal Board directs.

SECTION 1.9

The parties shall pay, in equal shares, the fees and expenses to which the South Lake Referee may be entitled unless for just cause the Appeal Board or the South Lake Referee shall direct that payment thereof be borne in different proportions. In the event that the parties cannot agree on the amount of such fees and expenses, they will be set by the Appeal Board. The fees and expenses of the Appeal Board shall be set by the parties. In the event that the parties cannot agree on the amount of such fees or expenses, they will be fixed by the President of the American Arbitration Association pursuant to the Rules of the Association.

SECTION 1.10

Unless otherwise specifically provided, all questions of choice of law relative to controversies under this Agreement shall be within the sound discretion of the South Lake Referee and the Appeal Board.

SCHEDULE 2

The Bark Pile

The Company shall take the following measures by September 1, 1975 to reduce discharges into Ticonderoga Creek from or through the bark pile in the Village of Ticonderoga, New York:

(a) Appropriate grading and covering of the bark pile for the purpose of reducing, to the maximum extent feasible, seepage from the bark pile into Ticonderoga Creek or any watercourse flowing into Ticonderoga Creek; and

(b) The lowering of the water level in the pond adjacent to the bark pile for the purpose of reducing, to the maximum extent feasible, drainage from the pond through the bark pile to Ticonderoga Creek or any watercourse flowing into Ticonderoga Creek.

SCHEDULE 3

New Mill Air Emissions

SECTION 3.1

The Company shall endeavor in good faith to minimize malodorous air emissions from the New Mill.

SECTION 3.2

The Company by November 1, 1975 shall treat by thermal oxidation:

(a) the miscellaneous total reduced sulfur (hereinafter TRS) gases currently vented through the smelt tank scrubber;

(b) the gases from the condensate air stripper;

(c) the non-condensible gases currently burned in the lime kiln;

(d) the TRS gases from the seal tank (under) vents of the brown stock washers; and

(e) the TRS gases from the brown stock washers' exhaust system, including the hood vents.

SECTION 3.3

In the event that neither the power boiler nor the recovery boiler is used as the primary means for thermal oxidation of the non-condensible gases referred to in Section 3.2(c) of this Schedule, the Company shall maintain and operate the lime kiln, and appropriate equipment and fixtures, for thermal oxidation of the non-condensible gases in the lime kiln when the primary means of oxidation of the non-condensible gases is inoperative.

SECTION 3.4

Upon the entry of an order dismissing the amended complaint in No. 50, Original, the Company shall operate the recovery boiler in such a manner that the TRS emissions from that source shall not exceed:

(a) 5 ppm (parts per million) or 2.8 pounds per hour, whichever is more restrictive, as a daily arithmetic average; and

(b) 10 ppm or 5.6 pounds per hour, whichever is more restrictive, for more than 60 cumulative minutes per day.

The standards of performance referred to in this Section shall not be applicable during a period of 24 hours immediately before shutdown or during a period of 24 hours immediately following the commencement of startup operations of the recovery boiler.

SECTION 3.5

Commencing 90 days after the entry of an order dismissing the amended complaint in No. 50, Original, the Company shall:

(a) operate the lime kiln in such a manner that the TRS emissions from that source shall not exceed 10 ppm or 0.7 pounds per hour, whichever is more restrictive; provided, however, that this standard of performance shall not be applicable during a period of 24 hours immediately following the commencement of startup operations of the lime kiln;

(b) before any commencement of startup operations of the lime kiln and during any 24-hour startup period, maintain a sufficient amount of caustic (sodium hydroxide) in the scrubbing solution in the lime kiln scrubber for optimum removal of TRS; and

(c) when such caustic is used, continuously monitor and record the rate of flow of the caustic solution of known concentration, and periodically (at least once a shift) measure and record the pH of the scrubbing solution.

SECTION 3.6

The Company shall monitor continuously, in a reasonably accurate and reliable manner, the TRS emissions from the recovery boiler and the lime kiln and shall record continuously the results for each such source on a reasonably accurate and reliable automatic recording device.

SECTION 3.7

Emissions in excess of the limitations set forth in Section 3.4 or 3.5 of this Schedule shall not constitute a failure to comply with this Agreement in the absence of a finding by the South Lake Referee that objectionable odors attributable to the New Mill have been detected in the State of Vermont during a significant period of time.

SECTION 3.8

The parties shall not oppose the incorporation of Sections 3.2, 3.4 and 3.5 of this Schedule in the Consent Order in the proceeding now pending before the New York State Department of Environmental Conservation against the Company pursuant to Article 19 of the New York State Environmental Conservation Law.

SCHEDULE 4

New Mill Water Discharge

SECTION 4.1

The parties shall not oppose the incorporation of the following effluent limitations in the first NPDES permit to be issued to the Company with respect to the New Mill pursuant to Section 402 of the Federal Water Pollution Control Act:

(a) The amount of BOD_5 in the process waste water effluent shall not exceed 4,400 pounds per day as a monthly average; and

(b) The amount of total phosphorus (as P) in the process waste water effluent shall not exceed a concentration of 0.5 mg/1 as a monthly average or 88 pounds per day as a monthly average, whichever is more restrictive.

Until such time as the Company can demonstrate that it has installed an effluent flow-measuring system that can reliably measure the process waste water effluent on a continuous basis, the flow to be used in computing the loadings in number of pounds per day shall be the measured intake of water to the New Mill.

SECTION 4.2

The Company shall test the process waste water effluent twice a year during 1975 and 1976 to determine whether it is toxic to fish. To the extent feasible, one test per year shall be conducted during normal operations when black liquor is present in the process waste water effluent as a result of its being released from the spill pond to the waste treatment system and one test per year shall be conducted during normal operations when no black liquor is present in the process waste water effluent. The effluent shall be considered to be toxic if, over a 96-hour period, 20 per cent of the test fish fail to survive in a solution composed of 65 per cent process waste water effluent and 35 per cent water taken from Lake Champlain. The test fish to be used shall be yellow perch no greater than four inches in length taken from Lake Champlain at a point or points more than five miles distant from the point of discharge of the process waste water effluent. The procedures used and the results of these tests shall be reported in writing to the State of Vermont within 60 days after the tests have been completed.

SECTION 4.3

During the period from May 1 to November 30 of each calendar year, the Company shall:

(a) minimize, to the extent practicable, discharges of any type of black liquor through the waste water treatment system; and

(b) not discharge the contents of its spill pond through the waste water treatment system; provided, however, that it may discharge up to 15,000 pounds of BOD_5 per day from the spill pond for the purpose of maintaining the treatment system when the pulp and paper manufacturing processes are not in operation. An analysis for BOD_5 in the spill pond shall be conducted prior to discharge pursuant to the provisions of this paragraph.

SECTION 4.4

The parties shall not oppose the incorporation of the following requirements in the first NPDES permit to be issued to the Company with respect to the New Mill pursuant to Section 402 of the Federal Water Pollution Control Act:

(a) the Company shall sample and test its process waste water effluent as follows: color—daily; BOD_5 and total phosphorus (as P)—three days per week, none of which shall be consecutive to each other; settleable solids and suspended solids—five days per week; flow, temperature, and pH—continuous;

(b) the test for BOD_5 shall be performed on a twenty-four hour composite sample that has been refrigerated during collection and prior to analysis, and the analysis shall begin no more than two hours after collection of the composite;

(c) the test for total phosphorus (as P) shall be performed on the same sample as that referred to in paragraph (b) of this Section within 24 hours after collection of the composite, and such sample shall be preserved within two hours of collection; and

(d) the suspended solids shall be determined on the composite referred to in paragraph (b) of this Section, or on a minimum of four grab samples collected at four separate times at not less than four-hour intervals over a 16-hour period, at the option of the Company; provided, however, that:

(e) the requirements specified in paragraphs (a), (b), (c), and (d) of this Section shall not be applicable during shutdowns or total closures of the New Mill.

SECTION 4.5

All process waste water effluent samples to be tested for total phosphorus (as P) shall be collected and stored until analysis in Pyrex glass containers that have been pre-washed in a ten per cent (10%) solution of warm hydrochloric acid and subsequently rinsed three times with distilled water.

SECTION 4.6

(a) The effluent limitations and requirements set forth in Sections 4.1 and 4.4 of this Schedule, except for total phosphorus (as P), shall be in force as a result of this Agreement, effective upon the entry of an order dismissing the amended complaint in No. 50, Original, even if such limitations and requirements are not incorporated in the NPDES permit.

(b) The limitation for total phosphorus (as P) set forth in Section 4.1(b) of this Schedule shall become effective and in force as a result of this Agreement on July 1, 1977, even if such limitation is not incorporated in the NPDES permit.

IN WITNESS WHEREOF, the parties, through their authorized agents, have executed this Agreement this 23rd day of September, 1974.

STATE OF VERMONT

Witnesses:

(Illegible)

/s/ KIMBERLY B. CHENEY

.....

Kimberly B. Cheney
Attorney General of
Vermont

.....

INTERNATIONAL PAPER
COMPANY

.....

(Illegible)

/s/ A.P. FOSTER

.....

A. P. Foster
Vice-President,
Engineering and
Environmental
Management

[Jurat omitted in printing]

APPENDIX A

This document is delivered pursuant to Article III(A)(1) of an "Agreement of Settlement" between the State of Vermont and International Paper Company and Atricle IV(A)(1) of an "Agreement of Settlement" between the State of Vermont, International Paper Company, the State of New York, and the United States, both dated September 23, 1974, which Agreements constitute the basis for the settlement of *State of Vermont* v. *State of New York, et al.*, No. 50, Original. The provisions of Articles III(A) and IV(A) of those respective Agreements are incorporated herein by reference.

1. THE STATE OF VERMONT, a sovereign state, and all of its officers, agents, employees, and representatives, for and in consideration of the execution of two Agreements referred to above and the agreement of International Paper Company (hereinafter referred to as "the Company") to comply with the provisions of such Agreements, does hereby covenant not to sue, or bring or assert any claims, actions, or demands whatsoever against, the Company (as defined in paragraph 5 below) for or with respect to any matters which were or might have been alleged by the State of Vermont, or encompassed within the original or amended complaint, in *State of Vermont* v. *State of New York, et al.*, United States Supreme Court, No. 50, Original, relating to (a) alleged past, present and future harm caused by or arising from the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain, (b) alleged past, present and future harm caused by or arising from discharges to the water from the Company's Old Mill (located in the Village of Ticonderoga, New York) prior to the entry of an order dismissing the amended complaint in No. 50, Original, (c) alleged past, present and

future harm caused by or arising from emissions to the air from the Company's Old Mill prior to the entry of an order dismissing the amended complaint in No. 50, original and (d) alleged harm caused by or arising from emissions to the air from the Company's New Mill (located approximately four miles north of the Village of Ticonderoga, New York) prior to the entry of an order dismissing the amended complaint in No. 50, Original.

2. This document shall inure only to the benefit of the Company. It shall not inure to the benefit of the State of New York or any other person, government or entity (including, but not limited to, any alleged joint tortfeasor) who may be liable, primarily or secondarily or otherwise, at law or in equity, with respect to the alleged harm dealt with in subparagraphs (a)-(d) of paragraph 1 of this document, or the abatement thereof.

3. The State of Vermont expressly reserves all rights, claims, actions, suits, demands and causes of action that it has or may have against any person, government or entity other than the Company to recover damages for all harm, if any, arising after the date of entry of an order dismissing the amended complaint in No. 50, Original, and to obtain any legal, equitable or other relief to which it hereafter may be entitled and which is related to or arises out of the matters dealt with in paragraph 1 of this document.

4. It is understood and agreed by the parties hereto, and it is their intention, that this document shall be construed as, and shall have the effect of: (a) a covenant not to sue at common law, and (b) not barring, disminishing or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the State of Vermont may have against anyone other than the Company, except as the same are precluded by Article

III(A)(2) and Article IV(A)(2), respectively, of the two Agreements referred to above.

5. The Company shall be defined as in Article I(A) of the two Agreements referred to above and, for the purposes only of this document and Articles III(A) and IV(A), respecively, of those two Agreements, shall be further defined to include any and all of the Company's past, present, and future directors, officers, employees, and corporate affiliates (including any and all past, present, and future directors, officers, and employees of such affiliates).

6. It is understood and agreed that this document contains the entire agreement with respect to the matters referred to herein, and there are no representations of warranties with respect to such matters except as expressly stated herein.

IN WITNESS WHEREOF, I, Kimberly B. Cheney, acting with lawful authority for and on behalf of the State of Vermont, have executed this document and affixed the Seal of the State of Vermont this day of , 1974.

STATE OF VERMONT

KIMBERLY B. CHENEY

.....

Attorney General of Vermont

[SEAL]

AGREEMENT OF SETTLEMENT BETWEEN THE STATE OF VERMONT, THE STATE OF NEW YORK, INTERNATIONAL PAPER COMPANY, AND THE UNITED STATES OF AMERICA

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AGREEMENT OF SETTLEMENT BETWEEN
THE STATE OF VERMONT,
THE STATE OF NEW YORK,
INTERNATIONAL PAPER COMPANY,
AND THE
UNITED STATES OF AMERICA

AGREEMENT, made this 23rd day of September, 1974 between the State of Vermont, the State of New York, the United States of America, and International Paper Company;

WHEREAS, by *per curiam* Opinion, dated June 3, 1974, the Supreme Court of the United States declined to approve a proposed consent decree signed on April 24, 1974 by counsel for each of the parties (including the intervenor) in *Vermont* v. *New York et al.*, No. 50, Original, for reasons more fully stated in the Opinion;

WHEREAS, the Court in Part II of that Opinion stated:

"A settlement of this interstate dispute by agreement of the parties is another alternative. Once a concensus is reached there is no reason, absent a conflict with an interstate compact, why such a settlement would not be binding. And such a settlement might be the basis for a motion to dismiss the complaint. Cf. 32 Orig., *Missouri* v. *Nebraska*, decided May 28, 1974, — U.S. —."

WHEREAS, all parties to No. 50, Original desire to settle that action in the manner suggested in the above-quoted language of the Court's Opinion and to file a Motion to

Dismiss without prejudice the amended complaint in No. 50, Original on the basis of the settlement set forth, in part, in this Agreement;

WHEREAS, the State of Vermont and International Paper Company have, contemporaneously with the execution of this Agreement by the State of Vermont, State of New York, United States of America, and International Paper Company, executed a separate agreement (hereinafter referred to as the "two-party agreement") upon which the Motion to Dismiss will also be based;

WHEREAS, this Agreement is, and shall be construed to be, a convenient arrangement for cooperation among the parties concerning the issues presented in No. 50, Original, (a) without affecting or limiting the power of the Congress of the United States to enact legislation concerning matters within lawful Federal jurisdiction; (b) without increasing in any way the political influence or powers of either of the two contracting states; (c) without encroaching on or impairing the supremacy of the United States in matters within its constitutional jurisdiction, or interfering with the rightful management of particular subjects placed under the entire control of the United States (see *Virginia* v. *Tennessee*, 148 U.S. 503, 517-519);

WHEREAS, this Agreement preserves and shall be construed as preserving the power and authority of each Federal or State regulatory body or agency having jurisdiction in the premises with respect to the future waste water discharges and air emissions from the Old Mill and the New Mill, as hereinafter defined; and

WHEREAS, there is no conflict between (a) this Agreement (and the two-party agreement) and (b) any interstate compact, including the New England Water Pollution Control Compact (61 Stat. 682);

NOW, THEREFORE, the State of Vermont, State of New York, United States of America, and International Paper Company (hereinafter collectively referred to as the "parties" to this Agreement) hereby stipulate and agree that this Agreement may be filed with the Clerk of the Supreme Court of the United States as the basis, in part, for a Motion to Dismiss the amended complaint in No. 50, Original or any other litigation, proceeding, or otherwise. amended complaint in No. 50, Original is not granted, this Agreement, the Appendices annexed hereto, and accompanying documents executed by any party in connection with this Agreement shall be of no effect whatsoever in No. 50, Original or any other litigation, proceeding, or otherwise, and the making of this Agreement, the Appendices annexed hereto, and accompanying documents shall not in any manner prejudice any consenting signatory in No. 50, Original or any other litigation, proceeding, or otherwise. This Agreement shall constitute a contract in settlement of No. 50, Original but shall not constitute an adjudication or finding on any issue of fact or law, or evidence or admission by any party with respect to any such issue raised therein. In consideration of the mutual rights and obligations herein set forth, the following provisions are agreed to and accepted by the parties and shall be binding upon them respectively.

I. DEFINITIONS. Whenever used or referred to in this Agreement, unless a different meaning appears clearly from the context:

(A) "The Company" means International Paper Company, a New York corporation, having its principal office at 220 East 42nd Street, New York, New York, and its successors and assigns, including any person, corporation, or other entity that succeeds to the business of International Paper Company;

(B) "Agreement" means this Agreement executed and consented to by the parties, and any amendments made from time to time, but does not include those documents annexed hereto and marked as Appendices;

(C) "Federal Water Pollution Control Act" means Public Law No. 92-500, 86 Stat. 816, as heretofore amended;

(D) "New Mill" means the land, buildings, equipment, and materials, including any additions or modifications thereto, at the manufacturing and waste treatment system sites owned and used by the Company and located approximately four miles north of the Village of Ticonderoga, New York;

(E) "Old Mill" means the land, buildings, equipment, and materials, including any additions or modifications thereto, located in the Village of Ticonderoga, New York owned and formerly operated as a kraft pulp and paper mill by the Company, but does not include the dam and certain contiguous property specified in Chapter 675 of the Laws of 1973 of the State of New York; and

(F) "South Lake Champlain" means that portion of Lake Champlain extending from Whitehall, New York to the Lake Champlain Bridge near Crown Point, New York.

II. THE COMPANY. The Company agrees to comply with all of the provisions of this Agreement relating to it, including the following:

(A) It shall take appropriate steps to inform its directors and responsible officers of the contents of this Agreement and the appendices annexed hereto; and

(B) It shall not oppose in the first National Pollutant Discharge Elimination System (hereinafter referred to as the "NPDES") permit to be issued to the Company with respect to the New Mill pursuant to Section 402 of the Federal Water Pollution Control Act, the inclusion of process waste water effluent limitations which confirm to those set forth in Section 4.1 of Schedule 4 of the two-party agreement.

III. THE STATE OF NEW YORK. The State of New York shall comply with all provisions of this Agreement relating to it, including the following:

(A) It shall:

(1) continue its program of studies of, and make recommendations with respect to, control of septic tank, sewer, agricultural, and other discharges to the South Lake Champlain basin;

(2) submit annually to each of the parties a written report of its activities undertaken pursuant to subparagraph (1) of this paragraph; and

(3) make available to each of the parties upon request, for inspection and copying, any such studies and recommendations, and any data or other information relating thereto.

(B) It shall:

(1) denominate, pursuant to the Federal Water Pollution Control Act, the Village of Ticonderoga, New York, as the municipality in the State of New

York having the highest priority in the allocation of federal funding for the development and construction of municipal waste treatment works; and

(2) abate the discharge of all raw sewage into South Lake Champlain pursuant to the applicable provisions of the Federal Water Pollution Control Act and the New York State Environmental Conservation Law.

(C) It shall give prority to the processing of, and promptly consider and respond to, any applications by the Company for permits to construct, modify, or operate pollution control facilities at the New Mill.

(D) It shall take such steps as are necessary to inform the appropriate members of the New York State Government (including, without limitation, the appropriate officials of the New York Department of Environmental Conservation) of the contents of this Agreement and the appendices annexed hereto.

(E) It shall not oppose in the first NPDES permit to be issued to the Company with respect to the New Mill pursuant to Section 402 of the Federal Water Pollution Control Act, the inclusion of process waste water effluent limitations which conform to those set forth in Section 4.1 of Schedule 4 of the two-party agreement; provided, however, that in the event that the State of New York succeeds to the administration of the NPDES prior to the issuance of such permit, this paragraph shall not be applicable with respect to the responsibilities of the State of New York as the permit-issuing agency.

(F) It shall give priority to the processing of, and promptly consider and resolve or adjudicate, any matter brought to its attention and for which application

has been made to its Department of Environmental Conservation or any successor agency relating to the abatement of air pollution or water pollution at the New Mill.

IV. THE STATE OF VERMONT. The State of Vermont shall comply with all provisions of this Agreement relating to it, including the following:

(A) (1) Within sixty days after the entry of an order dismissing the amended complaint in No. 50, Original, Vermont shall deliver to the Company a separate, executed copy of the document annexed hereto as Appendix A. The parties agree that Appendix A shall be construed and take effect as a covenant not to sue at common law in that:

(a) it shall prevent the State of Vermont from proceeding against the Company in any manner or respect specified in Appendix A, and (b) it shall not have the effect of barring, diminishing, or affecting in any way any legal or equitable rights or claims, actions, suits, causes of action, or demands that the State of Vermont may have against the State of New York or any person other than the Company, except as the enforcement of the same may be precluded by subparagraph (2) of this paragraph. The parties agree not to assert in any litigation or proceeding that Appendix A has any effect other than as stated in this subparagraph.

(2) Notwithstanding any provision of Appendix A or any reservation by the State of Vermont made therein, and notwithstanding the fact that No. 50, Original is to be dismissed without prejudice, the State of Vermont shall not seek to recover from any party to No. 50, Original damages for harm to the South Lake, its waters, shores, adjacent areas, and the atmosphere above and near it, allegedly suffered on or prior to the entry of an order dismissing the amended complaint in No. 50, Original, for which the State of Vermont could have sought recovery in No. 50, Original.

(B) It shall:

(1) submit to each of the parties by April 15 of each year, a written report describing the activities and studies relating to the natural environment of the South Lake Champlain basin that are contemplated to be undertaken by or for its Department of Water Resources during the following period of May 1-November 30;

(2) submit to each of the parties by February 15 of each following year, a written report describing all the activities and studies relating to the natural environment of the South Lake Champlain basin actually undertaken by or for its Department of Water Resources during the preceding period of May 1-November 30; and

(3) make available to each of the parties, upon request, for inspection and copying, any documents, not privileged, relating in whole or in part to the activities and studies referred to in subparagraphs (1) and (2) of this paragraph.

(C) It shall:

(1) study and recommend control of septic tank, sewer, agricultural, and other discharges within the Vermont portion of the South Lake Champlain basin;

(2) study and recommend the enactment of legislation or the promulgation of regulations concerning the use of detergents in Vermont;

(3) submit annually to each of the parties a written report describing its activities undertaken pursuant to subparagraphs (1) and (2) of this paragraph; and

(4) make available to each of the parties, upon request, for inspection and copying, any documents, not privileged, relating in whole or in part to its activities undertaken pursuant to subparagraphs (1) and (2) of this paragraph.

(D) It shall take such steps as are necessary to inform the appropriate members of the Vermont State Government (including, without limitation, the appropriate officials of the Vermont Agency of Environmental Conservation) of the contents of this Agreement and the appendices annexed hereto.

(E) It shall monitor on a regular basis and in a scientically acceptable manner, the water quality in that part of Lake Champlain from Chipman Point to the Lake Champlain Bridge near Crown Point, New York, and shall make the results of such monitoring available to the parties for inspection and copying upon reasonable request.

V. THE UNITED STATES OF AMERICA. The United States of America, by executing this Agreement: (1) recognizes the several bases, as set forth in paragraph (A) below, upon which the Company has entered into this Agreement and the two-party agreement and (2) agrees to comply with all the provisions of this Agreement relating to it, including the following:

(A) (1) The United States recognizes that the Company contends that the control technology required to comply with the effluent and emission limitations set forth in the two-party agreement goes beyond

the best practicable control technology currently available and the best available technology economically achievable;

(2) The United States further recognizes that the prosphorus limitation of 0.5 mg/1 set forth in Section 4.1 of Schedule 4 of the two-party agreement was agreed to by the Company by reason of the special characteristics of South Lake Champlain and recognizes that this phosphorus limitation was accepted by the Company in an effort to achieve settlement of a long, costly, and complicated court controversy; and

(3) The United States agrees that the inclusion of the limitations set forth in the two-party agreement shall not be used by it as a basis or justification for the United States Environmental Protection Agency effluent guidelines or emission regulations with respect to the bleached kraft pulp and paper industry. This in no way limits the United States from using technical information or studies related to pollution control at the New Mill in the future development of guidelines or standards for the regulation of effluents and emissions with respect to the bleached kraft pulp and paper industry. In establishing any such guidelines, the United States shall give appropriate consideration to: (a) the circumstances mentioned in subparagraph (2) of this paragraph, including the fact that such technical information or studies may exist only because special facilities will have been devised to meet the special problems of the receiving water here involved, and (b) any other available and relevant technical information or studies derived from the bleached kraft pulp and paper industry.

(B) The United States Environmental Protection Agency, upon entry of an order dismissing the amended complaint in No. 50, Original, shall deliver to the Company the signed original of a letter concerning the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain, a copy of which is annexed hereto as Appendix B.

(C) If, after five years from the entry of an order dismissing the amended complaint in No. 50, Original, the United States has not initiated action in any court seeking to impose liability upon the Company for environmental harm resulting from the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain because of past waste discharges, the United States shall then, in consideration of the signing and performance of this Agreement and also in consideration of the signing and performance of the two-party agreement, execute and deliver to the Company a copy of the document annexed hereto as Appendix C, which document forever bars the United States from seeking to impose liability upon the Company for such accumulation of sediment, except to the following extent: The United States shall not be precluded from seeking to establish at any time that the Company may be liable to meet any part of the costs arising out of remedial action taken as a consequence of the needs of anchorage or navigation. The document annexed hereto as Appendix C shall be construed as, and have the effect of, a covenant not to sue at common law.

(D) The United States Environmental Protection Agency shall give priority to, and promptly consider and take action regarding, the NPDES application

presently on file with that agency relating to process waste water effluent from the New Mill.

(E) The United States Environmental Protection Agency shall approve the denomination made by the State of New York, pursuant to subparagraph III (B)(1) of this Agreement, of the Village of Ticonderoga, New York, as the municipality in the State of New York having the highest priority in the allocation of federal funding for the development and construction of municipal waste treatment works.

(F) It shall take such steps as are necessary to inform the appropriate members of the United States Government (including, without limitation, the appropriate officials of the United States Environmental Protection Agency) of the contents of this Agreement and the appendices annexed hereto.

(G) It shall promptly consider, and resolve or adjudicate within a reasonable time, any matter brought to its attention and for which application has been made to its Environmental Protection Agency or any successor agency relating to the abatement of air pollution or water pollution at the New Mill.

VI. GENERAL PROVISIONS.

(A) Subject to the provisions of paragraph V (A) of this Agreement, the provisions of this Agreement are applicable and limited to the activities of the Company at the Old and New Mills and are not to be construed as applicable to, or in any way providing a precedent with respect to, any other mill, installation, facility, or location.

(B) Nothing herein (including, but not limited to, the emission and effluent limitations prescribed in the

two-party agreement) shall be construed to affect the authority, if any, of any regulatory or law enforcement authority with lawful jurisdiction:

(1) to regulate waste water discharges or air emissions from the Old Mill and the New Mill;

(2) to seek to abate the effects of such discharges or emissions; or

(3) to take such actions as are authorized by law to accomplish these ends (including, but not limited to, sampling at, or inspection of, the New Mill and the Old Mill).

(C) The provisions of this Agreement shall not be construed as, nor shall they operate as, an admission that the Company or the State of New York has or has not violated any law or regulation or otherwise committed a breach of duty at any time, and shall not constitute, in No. 50, Original or any other litigation or proceeding or otherwise evidence or any implication of any such violation or breach of duty.

(D) Any testimony taken or any exhibit received in evidence in No. 50, Original shall be received in evidence, if otherwise relevant and admissible, in any hearing or proceeding between or among the parties or any of them, and no party shall object to the introduction of such testimony or exhibit on the ground that the offering party has failed to produce the witness to testify with respect to such testimony or to authenticate such exhibit. The parties, however, reserve their rights, if any, to move to strike all or any portion of any testimony taken and all or any portion of any exhibit received in evidence in No. 50, Original.

(E) Any party may file this Agreement and the two-party agreement for recording in the appropriate

land records pertaining to the Old and New Mills, and the custodian of such land records is authorized to receive it for recording and, upon payment of any necessary fee, forthwith to record and index it appropriately under the name of the Company.

(F) Nothing herein shall be construed as affecting any claims or rights of any citizens or residents of the State of Vermont or the State of New York that may exist against any party to this Agreement.

(G) The provisions of this Agreement shall apply to the New Mill as long as it exists, regardless of who owns or operates the New Mill.

(H) This Agreement does not resolve certain issues or claims raised by the pleadings in No. 50, Original. This is so in part because such issues or claims are likely to be dealt with by action of regulatory or executive agencies of the United States or the State of New York in the performance of their official duties. This Agreement shall not be construed as determinative of any such unresolved issues or claims (including, among others, those arising in the future based upon the alleged accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain). Claims disposed of in Appendix A and Appendix C annexed hereto and claims covered by subparagraph IV (A)(2) of this Agreement shall be regarded as resolved by this Agreement. Any issues or claims not resolved by this Agreement, or the two-party agreement, may be asserted in any forum having jurisdiction.

(I) It is understood and agreed by the parties that if any provision of this Agreement is by any court held to be invalid or unenforceable, as to all parties

or as to one or more parties hereto, the validity and enforceability of the remaining provisions of this Agreement and the two-party agreement, including, but not limited to, any provision dealing with the obligations between the State of Vermont and the State of New York, shall not be affected thereby, and the rights and obligations of the parties shall be construed and enforced as if this Agreement, as to all parties or as to one or more parties, as the case may be, did not contain the particular provision or provisions held to be invalid or unenforceable.

(J) The parties may waive any of the provisions of this Agreement by unanimous written agreement.

(K) If Vermont or the Company attempts to enforce any right, or seek relief from any obligation in this Agreement which also may be enforced or from which relief may be obtained under the provisions of the two-party agreement, enforcement or relief can be sought only pursuant to the terms and procedures of the two-party agreement.

IN WITNESS WHEREOF, the parties, through their authorized agents, have executed this Agreement this 23rd day of September, 1974.

Witnesses:

(Illegible)

(Illegible)

STATE OF VERMONT

/s/ Kimberly B. Cheney

Kimberly B. Cheney
Attorney General of
Vermont

(Illegible)

(Illegible)

STATE OF NEW YORK

Louis J. Lefkowitz

Louis J. Lefkowitz
Attorney General of
New York

(Illegible)

(Illegible)

INTERNATIONAL PAPER COMPANY

A. P. Foster

A. P. Foster
Vice-President,
Engineering and
Environmentl Management

(Illegible)

(Illegible)

UNITED STATES OF AMERICA

Robert H. Bork

Robert H. Bork
Solicitor General of the
United States

[Jurats omitted in printing]

APPENDIX A

This document is delivered pursuant to Article III(A)(1) of an "Agreement of Settlement" between the State of Vermont and International Paper Company and Article IV(A)(1) of an "Agreement of Settlement" between the State of Vermont, International Paper Company, the State of New York, and the United States, both dated September 23, 1974, which Agreements constitute the basis for the settlement of *State of Vermont* v. *State of New York, et al.*, No. 50, Original. The provisions of Articles III(A) and IV(A) of those respective Agreements are incorporated herein by reference.

1. THE STATE OF VERMONT, a sovereign state and all of its officers, agents, employees, and representatives, for and in consideration of the execution of two Agreements referred to above and the agreement of International Paper Company (hereinafter referred to as "the Company") to comply with the provisions of such Agreements, does hereby covenant not to sue, or bring or assert any claims, actions, or demands whatsoever against, the Company (as defined in paragraph 5 below) for or with respect to any matters which were or might have been alleged by the State of Vermont, or encompassed within the original or amended complaint, in *State of Vermont* v. *State of New York, et al.*, United States Supreme Court, No. 50, Original, relating to (a) alleged past, present and future harm caused by or arising from the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain, (b) alleged past, present and future harm caused by or arising from discharges to the water from the Company's Old Mill (located in the Village of Ticonderoga, New York) prior to the entry of an order dismissing the amended complaint in No. 50, Original, (c) alleged past, present and future harm caused by or arising from emissions to the air from the Company's Old Mill prior to the entry of an order dismissing the amended complaint in No. 50, Original and (d) alleged harm caused by or arising from emissions to the air from the Company's New Mill (located approximately four miles north of the Village of Ticonderoga, New York) prior to the entry of an order dismissing the amended complaint in No. 50, Original.

2. This document shall inure only to the benefit of the Company. It shall not inure to the benefit of the State of New York or any other person, government or entity (including, but not limited to, any alleged joint tortfeasor) who may be liable, primarily or secondarily or otherwise, at law or in equity, with respect to the alleged harm dealt with in subparagraphs (a)—(d) of paragraph 1 of this document, or the abatement thereof.

3. The State of Vermont expressly reserves all rights, claims, actions, suits, demands and causes of action that it has or may have against any person, government or entity other than the Company to recover damages for all harm, if any, arising after the date of entry of an order dismissing the amended complaint in No. 50, Original, and to obtain any legal, equitable or other relief to which it hereafter may be entitled and which is related to or arises out of the matters dealt with in paragraph 1 of this document.

4. It is understood and agreed by the parties hereto, and it is their intention, that this document shall be construed as, and shall have the effect of: (a) a covenant not to sue at common law, and (b) not barring, diminishing or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the State of Vermont may have against anyone other than the Company, except as the same are precluded by Article

III(A)(2) and Article IV(A)(2), respectively, of the two Agreements referred to above.

5. The Company shall be defined as in Article I(A) of the two Agreements referred to above and, for the purposes only of this document and Articles III(A) and IV(A), respectively, of those two Agreements, shall be further defined to include any and all of the Company's past, present, and future directors, officers, employees, and corporate affiliates (including any and all past, present, and future directors, officers, and employees of such affiliates).

6. It is understood and agreed that this document contains the entire agreement with respect to the matters referred to herein, and there are no representations or warranties with respect to such matters except as expressly stated herein.

IN WITNESS WHEREOF, I, Kimberly B. Cheney, acting with lawful authority for and on behalf of the State of Vermont, have executed this document and affixed the Seal of the State of Vermont this day of , 1974.

STATE OF VERMONT

KIMBERLY B. CHENEY

.....

Attorney General of Vermont

[SEAL]

APPENDIX B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

[Letterhead omitted]

Sept. 16, 1974

William L. Lurie, Esquire
Vice-President and General Counsel
International Paper Company
220 East 42nd Street
New York, New York 10017

Dear Mr. Lurie:

The position of the United States in *State of Vermont* v. *State of New York and International Paper Company*, Original No. 50, was stated in the Petition of Intervention of the United States of America filed in December 1972, namely, that removal of the sludge deposits in Ticonderoga Creek and the nearby waters of Lake Champlain at that time would not be in the public interest.

At the present time it is still the opinion of the Federal Government that water quality conditions and environmental factors do not justify dredging the sludge deposits in Ticonderoga Creek and the nearby waters of Lake Champlain. This conclusion is based upon the evaluation of data collected by all parties through the summer of 1973. It is apparent that since the 1970 Lake Champlain Enforcement Conference, the waters of Ticonderoga Creek and the nearby waters of Lake Champlain have improved appreciably in quality, *e.g.*, dissolved oxygen levels in the waters of Ticonderoga Creek and the nearby waters of Lake Champlain have been essentially meeting water quality

standards. The environmental effects of removal must be balanced against the observed water quality improvement.

The factors which may be contributing to such improved conditions are the cessation of discharges from the old IPC mill on Ticonderoga Creek, the high water levels in Lake Champlain during recent years, and measurable reduction in the effect of the sludge deposits upon overlying waters.

Although we are not able to predict, at this time, what the future of the sludge deposits will be, we are able to reaffirm our position thatt he quality of the aquatic environment on and around those deposits has improved and is continuing ot improve.

Sincerely yours,

/s/ ALAN G. KIRK, II
Alan G. Kirk, II
Assistant Administrator for
Enforcement and General Counsel
(EG-329)

cc.:
Mr. Keith Fry
Director, Corporate Air
& Water Management
International Paper Company

APPENDIX C

WHEREAS, the position of the United States in *State of Vermont* v. *State of New York and International Paper Company*, No. 50, Original, was stated in the Petition of Intervention of the United States filed in December 1972, namely, that removal of the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain at that time would not be in the public interest; and

WHEREAS, the United States entered into an "Agreement of Settlement" with the other parties to the aforementioned civil action on September 23, 1974; and

WHEREAS, the position of the United States Environmental Protection Agency was stated by it in a letter (attached to the aforementioned "Agreement of Settlement" as Appendix B) dated September 16, 1974, to International Paper Company, a corporation existing under the laws of the State of New York, located at New York, New York (hereinafter "the Company"); and

WHEREAS, in Article V(C) of the aforementioned "Agreement of Settlement" the United States agreed to execute and deliver to the Company a document forever barring the United States from seeking to impose liability upon the Company for environmental harm resulting from the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of Lake Champlain because of past waste discharges (except for any part of the costs, for which the Company at any time may be established to be liable, arising out of remedial action taken as a consequence of the needs of anchorage or navigation) if the United States did not initiate action in any Court within five years from the entry of an order dismissing the amended complaint in

No. 50, Original, seeking to impose liability upon the Company for environmental harm resulting from such accumulation of sediment; and

WHEREAS, the United States has not initiated any such action against the Company within such time;

NOW, THEREFORE, in view of the foregoing and in consideration of the signing and performance of the aforementioned "Agreement of Settlement" between the parties to No. 50, Original and also in consideration of the signing and performance of a separate "Agreement of Settlement" between the Company and the State of Vermont dated September 23, 1974, the United States does hereby release and forever discharge the Company, and any and all of its past, present, and future directors, officers, employees, and corporate affiliates (including any and all past, present, and future directors, officers, and employees of such affiliates) from all liability for the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay Area of Lake Champlain because of past waste discharges, except to the following extent:

The United States shall not be precluded from seeking to establish at any time that the Company may be liable to meet any part of the costs arising out of remedial action taken as a consequence of the needs of anchorage or navigation.

This document shall be construed as, and have the effect of, a covenant not to sue at common law.

This document contains the entire agreement between the United States and the Company with respect to the matters referred to herein and there are no representations or warranties with respect to such matters except as expressly stated herein.

This document shall enure to, and only to, the benefit of each of the corporations and persons referred to above and

their respective successors, assigns, heirs, executors, and administrators.

IN WITNESS WHEREOF, I, , acting with lawful authority for and on behalf of the United States, have executed this document and affixed the Seal of the Department of Justice of the United States of America this day of , 1979.

UNITED STATES OF AMERICA

By: .....
[Title]

United States Department of Justice
Washington, D.C.

[SEAL]

Exhibit B to Dolloff Affidavit

Permit No.: NY 0020036, NY 0004413

Name of Permittee:
International Paper Company

Effective Date: December 31, 1974

Expiration Date: December 31, 1979

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT

DISCHARGE PERMIT

In reference to the above application for a permit authorizing the discharge of pollutants in compliance with the provisions of the Federal Water Pollution Control Act, as amended by the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, October 18, 1972 (33 U.S.C. § 1251-1376) (hereinafter referred to as "the Act"),

International Paper Company
220 East 42nd Street
New York, New York 10017

(hereinafter referred to as "the permittee")
is authorized by the Regional Administrator, Region II, U.S. Environmental Protection Agency
to discharge from its Ticonderoga Mill, located at

Ticonderoga, Essex County, New York
to Lake Champlain and Five Mile Creek
in accordance wtih the following conditions.

1. All discharges authorized herein shall be consistent with the terms and conditions of this permit; facility expansions, production increases or process modifications which result in new or increased discharges of pollutants must be reported by submission of a new NPDES application, or if such new or increased discharge does not violate

the effluent limitations specified in this permit, by submission to the Regional Administrator of notice of such new or increased discharges of pollutants; the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit.

2. After notice and opportunity for a public hearing, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

3. Notwithstanding Condition 2 above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge authorized herein and such standard or prohibition is more stringent than any limitation upon such pollutant in this permit, the Regional Administrator shall revise or modify this permit in accordance with the toxic effluent standard or prohibition and so notify the permittee.

4. The permittee shall allow the Regional Administrator or his authorized representative and/or the authorized representative of the State water pollution control agency, in the case of non-Federal facilities, upon the presentation of his credentials:

a. To enter upon the permittee's premises in which an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit;

b. To have access to and copy at reasonable times any records required to be kept under the terms and conditions of this permit;

c. To inspect at reasonable times any monitoring equipment or monitoring method required by this permit;

d. To sample at reasonable times any discharge of pollutants.

5. The permittee shall at all times maintain in good working order and operate as efficiently as possible any facilities or systems of treatment or control installed or utilized by the permittee to achieve compliance with the terms and conditions of this permit.

6. The issuance of this permit does not convey any property rights either in real estate or material, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of rights, nor any infringement of Federal, State or local laws or regulations; nor does it obviate the necessity of obtaining State or local assent required by law for the discharge authorized.

7. This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any navigable waters.

8. The specific effluent limitations and other pollution controls applicable to the discharge permitted herein are set forth in the following conditions. The following conditions

also set forth self-monitoring and reporting requirements. Unless otherwise specified, the permittee shall submit duplicate original copies of all reports to the head of the State water pollution control agency and the Regional Administrator. Except for data determined to be confidential under Section 308 of the Act, all such reports shall be available for public inspection at the office of the Regional Administrator. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 309 of the Act.

9. *General Limitations.*

a. The permittee shall not discharge hazardous substances into or upon navigable waters or adjoining shorelines in quantities defined as harmful in regulations promulgated by the Administrator pursuant to Section 311(b)(4) of the Federal Water Pollution Control Act, as amended. Nothing in this permit shall be deemed to preclude the institution of any legal action nor relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Federal Water Pollution Control Act, as amended, or under any other Federal or State law or regulations.

b. Except as specifically authorized in this permit, the permittee shall not discharge floating solids or visible foam in other than trace amounts.

c. *Initial Effluent Limitations.* During the period beginning on December 31, 1974 and lasting until July 1, 1977, discharges shall be limited by the permittee as specified below:

Discharge Serial Number	Parameter	Discharge Limitation in kg/day (lbs/day) —Net Daily Average	Daily Maximum	Other Limitations Average	Maximum
001	Total Kjeldahl Nitrogen	2500 (5500)	4500 (9900)		
	Total Suspended Solids	14,515 (32000)	21772 (48000)		
	BOD_5	2000 (4400)	3600 (7920)		
	pH Range (units)				4.3-9.0
002 Sanitary Discharge	Total Suspended Solids	6(13)	12(26)		
	BOD_5	6(13)	12(26)		
	Fecal Coliform Bacteria MPA/ 100 (ml)			200*	400**
	pH Range (units)				6.0-9.0

d. *Initial Thermal Limitations*—Unless specified otherwise in Conditions 10(b) and 11, the following limitations apply on the effective date of this permit and last for the duration of the permit.

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* The average is based upon a geometric mean of the values for effluent samples collected during a month.

** The maximum is based on the geometric mean of the values for effluent samples collected over a 7 consecutive day period.

The permittee shall discharge effluent(s) such that the following conditions are satisfied:

(1) Discharge Serial No.	Thermal Effluent Limits
001	a. The maximum discharge temperature shall not exceed 37.2°C(99°F) at any time.
	b. The effluent(s) shall be discharged in such a manner so as to provide that the water surface temperature shall not exceed 32.2°C(90°F) at any point.

10(a). *Required Effluent Discharge.* During the period beginning July 1, 1977 and lasting until the date of expiration of this permit, discharges shall comply with Condition 9(c) above and shall not exceed the values listed below for those parameters indicated:

Discharge Serial Number	Parameter	Discharge Limitation in kg/day (lbs/day) —Net Daily Average	Daily Maximum	Other Limitations Average	Maximum
001	Total Suspended Solids	3100 (6800)*	7440 (16,320)		
	Total Kjeldahl Nitrogen	635 (1400)	1143 (2520)		
	pH Range (Units)				6.5-8.5
	Total Phosphorous as P	40 (88)**	72 (158)		

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* Note: Or a concentration of 37 mg/liter, whichever is more restrictive.

** Note: Or a concentration of 0.5 mg/liter, whichever is more restrictive.

Color	Discharge shall not increase the color of any Vermont waters above 25 standard color units and shall not increase the color of any Vermont waters which have a background color of more than 25 standard units.
Turbidity	Discharge shall not increase the turbidity of any Vermont waters above 25 J.T.U. and shall not increase the turbidity of any Vermont waters which have a background turbidity of more than 25 J.T.U.
Toxic Wastes	There shall be no discharge of wastes containing any of the following substances in detectable amounts to the waters of Vermont. If it is established by the permittee that its process water contains an incoming level of the following substances due to natural or other causes, the concentration in the actual waste discharge shall not be increased:

Mercury
Thallium
DDT:
Dichlorodiphenyl trichloroethane
2, 4, 5-T
2, 4, 5-trichlorophenoxyacetic acid

Aldrin:
hexachlorohexahydro-endo
exo-dimethanonaphalene

Dieldrin:
hexachloroepoxyoctahydro-endo
exodimethanonaphalene

Endrin:
hexachloroepoxyoctahydro-endo
endodimethanonaphalene

Diquat:
diquat dibromide
6, 7-dihydrodicipyrido (1-2-a; 2', 1'-c)
pyraxinediium dibromide

There shall be no other wastes either alone or in combination with other substances or wastes in sufficient amounts or at such temperatures as to be injurious to fish life, make the waters unsafe or unsuitable as a source of water supply for drinking, culinary or food processing purposes or impair the water for any best usage as determined for the specific waters which are assigned to this class.

Settleable solids; Sludge Deposits;	None which are readily visible and attributable to sewage, industrial wastes or other wastes or which deleteriously increase the amounts of these constituents in receiving waters after opportunity for reasonable dilution and mixture with the wastes discharged thereto.

The discharge shall be limited at all times so as to be in full compliance with all applicable requirements of Sections 701, 702 and 704 of Title 6, Official Compilation of Codes,

Rules and Regulations—Classifications and Standards Governing Quality and Purity of Waters of New York State.

002: Sanitary Wastewater Treatment Plan Effluent

Parameter	*Effluent Limitation*
pH(range)	6.5 to 8.5
Settleable solids; sludge deposits	None which are readily visible and attributable to sewage, industrial wastes or other wastes or which deleteriously increase the amounts of these constituents in receiving waters after opportunity for reasonable dilution and mixture with the wastes discharged thereto.
Toxic wastes, oil, deleterious substances, colored or other wastes or heated liquids	None alone or in combination with other substances or wastes in sufficient amounts or at such temperatures as to be injurious to fish life, make the waters unsafe or unsuitable for bathing or impair the waters for any other best usage as determined for the specific waters which are assigned to this class.
General	The discharge shall be limited at all times so as to be in full compliance with all applicable requirements of Sections 701, 702, and 704 of Title 6, Official Compilation of Codes, Rules and Regulations — Classifications and Standards Governing Quality and Purity of Waters of New York State.
Disinfection	No discharge which is not effectively disinfected.

10(b) *Thermal Limits*

(1) After July 1, 1977, the permittee shall discharge effluent(s) such that within the waters of the State of Vermont the following conditions* are satisfied:

The permittee is prohibited from discharging any effluent into Lake Champlain that will cause the temperature of any of the receiving waters in Vermont to rise more than 1°F. when that water is above 60°F.; that will cause the temperature of any of the receiving waters in Vermont to rise more than 2°F. when that water is from 50°F. to 60 F.; and that will cause the temperature of any of the receiving waters in Vermont to rise more than 3°F. when that water is less than 50°F. Furthermore, the permittee is prohibited from discharging any waste which causes, upward or downward, a temperature change in any Vermont waters of more than 0.5°F. per hour from May 1 through October 31, nor 1.0°F. from November 1 through April 30. Finally, the permittee is prohibited from withdrawing from or discharging process or cooling water to the hypolimnion of any Vermont waters.

11. *Schedule of Compliance.* The permittee shall comply with the following schedule and shall report to both the Regional Administrator and the State Agency within 14

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* These Conditions have been imposed in order to protect the water quality of the waters of the State of Vermont. The area of applicability of these conditions can be modified by the future imposition of a thermal mixing zone by the authority of the State of Vermont subject to that State's statutes and regulations.

days following each date on the schedule detailing its compliance or noncompliance* with the schedule date and requirement:

(a) The permittee shall submit an engineering report to the State Agency covering any required additional treatment facilities by April 1, 1975;

(b) The permittee shall complete final plans and specifications for the treatment facilities and submit it to the State Agency in accordance with State requirements** by August 1, 1975;

(c) The permittee shall start construction of its facilities by October 1, 1975;

(d) The permittee shall report to the Regional Administrator and the State Agency on the progress of construction of its facilities by July 1, 1976;

(e) The permittee shall complete construction of the facilities by May 1, 1977;

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* Each notice of noncompliance shall include the following information:

(1) A short description of the noncompliance;

(2) A description of any actions taken or proposed by the permittee to comply with the elapsed schedule requirement without further delay;

(3) A description of any factors which tend to explain or mitigate the noncompliance; and

(4) An estimate of the date permittee will comply with the elapsed schedule requirement and an assessment of the probability that permittee will meet the next schedule requirement on time.

** All reports, plans and/or specifications that propose new or modified waste treatment and/or disposal facilities must be approvable and signed, and sealed, by a professional engineer, licensed to practice in the State in which the facilities are to be built.

(f) The permittee shall attain the operational levels required to achieve the limits specified in Condition 10 by July 1, 1977.

12. *Monitoring and Recording.* The permittee shall monitor and record the quantitative values of each discharge according to the following schedule and other provisions: for each discharge and for each Sampling Schedule listed below, the flow (in gallons per day) shall be measured*. Where net values are listed in Condition 9(c) and/or 10 the surface water intake is to be sampled with the same frequency and type of sample as specified below for each required parameter.

Grab samples only shall be taken for analysis of temperature, settleable solids, oil and grease, pH and any bacteriological analysis. Care shall be exercised when collecting a composite sample such that the proper preservative is present in the sample container during sample collection. Depending on the analysis to be conducted, several different containers and preservation techniques may be required. Samples shall be analyzed as quickly as possible after collection and in no case shall the maximum holding time exceed that contained in the references cited in Condition 12(f).

See special notes regarding sampling procedures following the required sampling schedule.

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* For all continuous discharges, flow shall be measured and recorded continuously; for intermittent discharges, the flow shall be measured and reported at a frequency coinciding with the most frequently sampled parameter. Methods, equipment, installation and procedures shall conform to those prescribed in the Water Measurement Manual, U.S. Department of the Interior Bureau of Reclamation, Washington, D.C., 1967.

(a) *Sampling Schedule*—Sampling shall commence on December 31, 1974.

Discharge Serial No.	*Parameter*	*Minimum Freq. of Analysis*	*Sample Type*
001	Color	Daily	Grab
	Settleable Solids	5 days/week	Grab
	Total Phosphorus	3 days/week***	Composite
	Nitrogen Series**	3 days/week***	Composite
	Total Suspended Solids	5 days/week	Composite
	BOD_5	3 days/week***	Composite
	BOD_{28}	1 day/week	Composite
	pH	Continuous	Continuous
002 Sanitary Discharge	BOD_5	Weekly	Composite
	Total Suspended Solids	Weekly	Composite
	pH	Weekly	Grab
	Fecal Coliform Bacteria	Weekly	Grab

Special Notes:

(1) The test for BOD_5 and BOD_{28} shall be performed on a 24-hour composite sample which has been refrigerated during collection and prior to analysis and the analysis shall begin no more than two hours after collection of the composite;

(2) The test for total phosphorus shall be performed on the same samples as (1) above within 24 hours after collection of the composite, and such sample shall be preserved within 2 hours of collection; and samples shall be collected and stored until analysis in Pyrex glass containers prewashed with warm 10% hydrochloric acid and rinsed 3 times with distilled water.

** Nitrogen Series: Total Kjeldahl Nitrogen, Ammonia, Nitrate, Nitrite.

*** These days shall not be consecutive to each other.

(3) The suspended solids shall be determined on the composite in (1) above or on a minimum of four grab samples collected at four separate times over a 16-hour period, at the option of the Company; and

(4) The above sampling shall not be required during scheduled shutdowns or total closures of the New Mill.

(b) *Thermal Sampling Schedule for Discharge 001* *

(1) Commencing on December 31, 1974 and lasting for the duration of the permit, discharge temperature shall be monitored continuously.

(2) Commencing on December 31, 1974 and lasting until July 1, 1977, the receiving water surface temperature shall be monitored monthly (July, August, and September only) at maximum heat discharge; the surface water temperature shall be measured at representative points (these points should correspond to the maximum surface temperatures) in the vicinity of discharge 001. The basis for choosing such points shall be included in the first submitted monitoring report for review by the Regional Administrator and State Certifying Agency. The sampling results shall be reported to the Regional Administrator and State Certifying Agency on the 28th of each month.

(3) Commencing on December 31, 1974 and lasting for the duration of the permit, surface isotherm plots for April through June and July through September at periods of maximum discharge of heat (the company shall indicate the heat content of the discharge in BTU/hour) down to the 1°F excess temperature (1°F above ambient

* Upon review of the monitoring data by the Regional Administrator and State Certifying Agency, further monitoring may be required.

receiving water temperature) shall be submitted to the Regional Administrator and State Certifying Agency on August 1 and November 1 of each year.

(c) *Modifications to Sampling Schedules*—The permittee may submit for approval an alternate schedule(s) to account for any realignment of discharges, for substitutions of parameters to be sampled, for analytical and sampling methods to be utilized, for elimination of intake sampling, for realignment of sampling locations so that concentrations to be measured are within reliable sensitivity ranges of the analytical techniques, and for the compositing by volume of individual discharge samples to make a single plant sample. With regard to substituting parameters such as TOC or COD for BOD, the permittee shall provide test data to support the correlation between the parameters. As for elimination of intake monitoring, the permittee shall provide sufficient data to establish the average levels of intake parameters and demonstrate that any variations in the intake characteristics would have minimum impact upon the permittee's discharge(s). In such cases, the alternate monitoring schedule shall provide for periodic verification of parameter correlations and intake parameter levels.

If the permittee monitors any pollutant more frequently than is required by this permit, he shall include the results of such monitoring in the calculation and reporting of the values required in the Discharge Monitoring Report Form (EPA Form 3320-1 (10-72)) in Condition 12(g). Such increased frequency shall be indicated on the Discharge Monitoring Report form.

(d) *Quality Control*—Adequate care shall be maintained in obtaining, recording, and reporting the required data on effluent quality and quantity, so that the precision and accuracy of the data will be equal to or better than that achieved by the prescribed standard analytical procedures.

The permittee shall calibrate and perform maintenance procedures on all monitoring and analytical instrumentation at sufficiently frequent intervals to ensure accuracy of measurements.

Sampling shall be representative of the volume and quality of effluent discharged over the sampling and reporting period.

The permittee is responsible for assuring that the methodology used is reliable for their specific wastes in their laboratory. The permittee must be able to demonstrate to the Regional Administrator that they have a viable quality control program.

(e) *Recording*—The permittee shall maintain and record the results of all required analyses and measurements and shall record, for all samples, the date and time of sampling, the sample method used, the dates analyses were performed, who performed the sampling and analyses, and the results of such analyses.

All records shall be retained for a minimum of 3 years, such a period to be extended during the course of any unresolved litigation or when so requested by the Regional Administrator. The permittee also shall retain all original stripchart recordings from any continuous monitoring instrumentation and any calibration and maintenance records for a minimum of 3 years, such period to be extended during the course of any unresolved litigation or when so requested by the Regional Administrator.

The permittee shall provide the above records and shall demonstrate the adequacy of the flow measuring and sampling methods upon request of the Regional Administrator. The permittee shall identify the effluent sampling point used for each discharge pipe by providing a sketch or flow diagram, as appropriate, showing the locations.

(f) *Sampling and Analysis*

All sampling and analytical methods used to meet the monitoring requirements specified above shall conform to guidelines establishing test procedures for the analysis of pollutants, published pursuant to Section 304(g) of the Federal Water Pollution Control Act, as amended. If the Section 304(g) guidelines do not specify test procedures for any pollutants required to be monitored by this permit and until such guidelines are promulgated, sampling and analytical methods used to meet the monitoring requirements specified in this permit shall, unless otherwise specified by the Regional Administrator, conform to the latest edition of the following references:

Standard Methods for the Examination of Water and Wastewaters, 13th Edition, 1971 American Public Health Association, New York, New York 10019.

A.S.T.M. Standards, Part 23, Water; Atmospheric Analysis, 1972, American Society for Testing and Materials, Philadelphia, Pennsylvania 19103.

W.Q.O. Methods for Chemical Analysis of Water and Wastes, April 1971, Environmental Protection Agency, Water Quality Office, Analytical Quality Control Laboratory, NERC, 1014 Broadway, Cincinnati, Ohio 45268.

(g) *Reporting*

The results of the above monitoring requirements shall be reported by the permittee in the units specified in Conditions 9(c) and 10. A report or a written statement shall be submitted even if no discharge occurred during the reporting period. A report shall also be submitted if there have been any modifications in the waste collection, treatment, and disposal facilities, changes in operations pro-

cedures, or other significant activities which alter the quality and quantity of the discharges or otherwise concern these Conditions. Permanent elimination of a discharge shall be promptly reported by the permittee in writing to the Regional Administrator.

The permittee shall include in this report any previously approved non-standard analytical methods used. Copies of the report shall be sent to both the Regional Administrator and the State Agency no later than the 28th day of the month following the completed reporting period.* A Discharge Monitoring Report from [EPA Form 3320-1 (10-72)] shall be used for reporting.

(h) *Other Requirements*

The permittee shall comply with all monitoring, recording, and reporting requirements of the State in which the discharge occurs.

The permittee shall transmit to the Regional Administrator a duplicate copy of any reports on radioactive liquid releases required to be submitted to the Atomic Energy Commission.

The permittee shall transmit to the Regional Administrator a duplicate copy of any reports on pesticides required to be submitted to the U.S. Department of Agriculture.

13. *Sludge Disposal.* Collected screenings, sludges, and other solids and precipitates separated from the permittee's discharges authorized by this permit and/or intake or supply water by the permittee shall be disposed of in such a manner as to prevent entry of such materials into navigable waters or their tributaries. Any live fish, shellfish, or other animals collected or trapped as a result of intake water

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* *Note*: Results for BOD_{28} shall be included in the report for the subsequent reporting period.

screening or treatment may be returned to their water body habitat. The permittee shall report on all effluent screenings, sludges and other solids associated with the discharge herein described. The following data shall be reported together with the monitoring data required in Condition 12:

a. The sources of the materials to be disposed of;

b. The approximate volumes and weights;

c. The method by which they were removed and transported;

d. Their final disposal locations.

14. *Air Emissions.* Nothing contained in this permit shall be deemed to authorize any air emissions containing waste gases and/or particulate matter from existing or future waste treatment facilities associated with the discharge herein described in excess of the permissible levels specified in Federal and State Air Quality Standards.

15. *Storm Water.* Any accumulated storm waters from the plant grounds which have come into contact with raw materials, chemicals, oils, contaminants, impurities, or other materials normally not present in storm water runoff shall not be discharged into navigable waters or their tributaries without prior treatment and reqiured authorization.

16. *Discharge Containing Parameter Not Previously Reported.* The permittee shall not discharge any wastewater containing a substance or characterized by a parameter which was indicated as absent in its NPDES Permit Application. In the event of such a discharge, the permittee shall notify the Regional Administrator and the State Agency prior to the discharge.

17. *Non-Compliance with Conditions.* In the event the permittee is unable to comply with any of these conditions, due, among other reasons, to:

(1) Breakdown of waste treatment equipment, (biological and physical-chemical systems including, but not limited to, all pipes, transfer pumps, compressors, collection ponds or tanks for the segregation of treated or untreated wastes, ion exchange columns, or carbon absorption units);

(2) Accidents caused by human error or negligence; or

(3) Other causes, such as acts of nature,

the permittee shall notify the Regional Administrator and the State Agency immediately by telephone and in writing within five days. The written notification shall include the following pertinent information:

(1) Cause of noncompliance;

(2) A description of the noncomplying discharge including its impact upon the receiving waters;

(3) Anticipated time the condition of noncompliance is expected to continue, or if such condition has been corrected, the duration of the period of noncompliance;

(4) Steps taken by the permittee to reduce and eliminate the noncomplying discharge; and

(5) Steps to be taken by the permittee to prevent recurrence of the condition of noncompliance.

Permittee shall take all reasonable steps to minimize any adverse impact to navigable waters resulting from noncompliance with any effluent limitation specified in this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

Nothing in this permit shall be construed to relieve the permittee from appropriate civil or criminal penalties for noncompliance.

Until July 1, 1977 anything in this permit to the contrary notwithstanding, the permittee shall not be deemed to have violated this permit if and to the extent that such violation is caused by trials or experiments in connection with pollution control, provided that IP shall have given EPA 10 days' prior written notice of the nature and time of any such trial or experiment and EPA shall have given written approval for the trial or experiment prior to its commencement.

18. *Alternate Power Supply.* The permittee shall provide by April 1, 1975 an alternate source of power to operate all waste treatment facilities or indicate, in writing to the Regional Administrator, that production shall be controlled or the discharge shall be handled in such a manner that, in the event the primary source of power to the waste treatment facilities fails, any discharge into the receiving waters will comply with the limits set herein. This alternate power supply, whether from a generating unit located at the plant site or purchased from an independent producer of power, must be separate from the existing power source used to operate the waste treatment facilities and must be operational at the time construction of the treatment facilities has been completed. If a separate facility located at the plant site is to be used, the permittee shall certify in writing to the Regional Administrator and to the State Agency when the facility is completed and prepared to generate power.

19. *Bypass Provision.* There shall be no bypass of the waste treatment facilities which would allow the entry of untreated or partially treated wastes to the receiving waters.

20. *Authorized Signature for Reporting Requirements.* All reports required to be submitted by a corporation must be signed by a principal executive officer of at least the level of vice president, or his duly authorized representative, if such representative is responsible for the overall operation of the facility from which the discharge described in the application form originates. In the case of a partnership or a sole proprietorship, all reports must be signed by a general partner or the proprietor respectively. In the case of a municipal, State, Federal or other public facility, the application must be signed by either a principal executive officer, ranking elected official or other duly authorized employee.

21. The United States Army Corps of Engineers conducts maintenance dredging of navigable waters and their tributaries pursuant to certain federal statutes. The permittee should be aware of its possible responsibilities under the maintenance dredging program. Under these laws, any person, firm or other entity discharging suspended solids into a navigable waterway of the United States, or tributary thereof, which contribute to the necessity for maintenance dredging of that waterway may be required to participate in the maintenance dredging program.

Definitions

Regional Administrator: Regional Administrator
Region II
Environmental Protection Agency
26 Federal Plaza
New York, New York 10007
Attn:
Permits Administration Branch

State Certifying Agency: Director
Bureau of Industrial Wastes
Pure Waters Program
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12201

Daily—each day on which the production facility is operating.

Weekly—One day during a calendar week (ordinarily the same day each week) and a normal operating day.

Monthly—One day during a calendar month (ordinarily the same day each month) and a normal operating day. (i.e. the 2nd Tuesday of each month)

Daily Average—the total discharge by weight or in other appropriate units as specified herein, during a calendar month divided by the number of days in the month that the production or commercial facility was operating. Where less than daily sampling is required by this permit, the daily average discharge shall be determined by the summation of all the measured daily discharges in appropriate units as specified herein divided by the number of days during the calendar month when the measurements were made.

Daily Maximum—the total discharge by weight or in other appropriate units as specified herein, during any calendar day.

Net—the amount of a pollutant contained in the discharge measured in appropriate units as specified herein, less the amount of a pollutant contained in the surface water body intake source, measured in the same units, over the same period of time.

1. The intake source must be the same water body that is being discharged to.

2. In cases where the surface water body intake source is pretreated for the removal of pollutants, the intake level of a pollutant to be used in calculating the net, is that level contained after the pretreatment stops.

Composite—a combination of individual (or continuously taken) samples obtained at regular intervals over the entire discharge day. The volume of each sample shall be proportional to the discharge flow rate. For a continuous discharge, a minimum of 24 individual grab samples (at hourly intervals) shall be collected and combined to constitute a 24-hour composite sample. For intermittent discharges of 4-8 hours duration, grab samples shall be taken at a minimum of 30 minute intervals. For intermittent discharges of less than 4 hours duration grab samples shall be taken at a minium of 15 minute intervals.

Gross—the poundage contained in the discharge. (Gross applies when the intake source is a municipal or private water supply, ground water, or a surface water body other than the one being discharged to.)

Grab—An individual sample collected in less than 15 minutes.

This permit and the authorization to discharge shall be binding upon the permittee and any successors in interest of the permittee and shall expire at midnight on December 31, 1979. The permittee shall not discharge after the above date of expiration. In order to receive authorization to discharge beyond the above date of expiration, the permittee shall submit such information, forms, and fees as are required by the agency authorized to issue NPDES permits no later than 180 days prior to the above date of expiration.

By authority of

GERALD M. HANSLER, P.E.

.....

(Regional Administrator)

November 18, 1974

MEYER SCOLNICK

.....

(Signature)

Meyer Scolnick
Director
Enforcement and Regional Counsel
Division

Exhibit C to Dolloff Affidavit

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

(Letterhead omitted)

March 15, 1977

T.C. Payne
Vice President, Environmental Quality
International Paper Company
P.O. Box 16807
Mobile, Alabama 36616

Re: International Paper Company
Ticonderoga Mill, New York
NPDES Permit Nos. NY 000 4413 and
NY 0020036

Dear Mr. Payne:

The above-referenced National Pollutant Discharge Elimination System permit requires the discharge identified and authorized therein to meet the final effluent limitations contained in the permit by July 1, 1977. This date for attainment of final effluent limitations is specified in section 301(b)(1) of the Federal Water Pollution Control Act (the Act). Section 301(b)(1) of the Act and subsequent decisions of the Administrator of the Environmental Protection Agency and Federal Courts prevent a permit issued pursuant to section 402 of the Act from embodying a compliance schedule which requires achievement of final effluent limitations later than July 1, 1977.

The above-referenced permittee has submitted documentation, including a critical path construction management analysis, intended to establish that it cannot, despite all reasonable best efforts, achieve the final effluent limitations

for Total Suspended Solids (TSS) and Total Phosphorous required by the permit by July 1, 1977.

After review and evaluation of the material submitted, EPA has determined that in the exercise of its prosecutorial discretion, the compliance schedule contained in the permit notwithstanding, it will not take action against the permittee under section 309 of the Act with respect to the permittee's failure to achieve the final effluent limitations for TSS and Total Phosphorous by July 1, 1977.

EPA will exercise its prosecutorial discretion as indicated above only so long as the permittee complies with all of the following conditions and requirements:

1. The permittee shall comply with the following schedule for the attainment of final limitations on TSS and shall report to both the Regional Administrator and the State Agency on or before each date on the schedule detailing its compliance with the schedule date and requirement:

a. Commencement of Pilot Study by December 1, 1976;

b. Completion of Pilot Study by October 1, 1977;

c. Submission of critical path analysis for attainment of operational level for TSS by November 1, 1977. Such a submission may detail a schedule by which the attainment of the final TSS limitations would be achieved prior to October 1, 1979, depending on the results of the completed Pilot Study. In no event may the submission call for attainment of the final TSS limitations at a later date than October 1, 1979;

d. Submission of an approvable engineering report based on Pilot Study and identifying components of tertiary system by November 1, 1977;

e. Submission of approvable final plans and specifications by March 1, 1978;*

f. Commencement of construction by May 1, 1978;

g. Submission of a report on the progress of construction of its facilities by September 1, 1978;

h. Submission of a report on the progress of construction of its facilities by January 1, 1979;

i. Submission of a report on the progress of construction of its facilities by May 1, 1979;

j. Completion of construction by September 1, 1979;

k. Attainment of operational levels for TSS by October 1, 1979.

2. Pursuant to the permittee's submission referenced above and in accordance with agreements previously reached, the permittee shall, during the period from October 1, 1977 through October 1, 1979, attain interim limitations on TSS which represent EPA Guidelines for this industry, as follows:

Daily Average 7,779 Kg/day (17,150 lbs/day)
Daily Maximum 14,402 Kg/day (31,750 lbs/day);

3. Following the completion of the Pilot Study on October 1, 1977, the permittee shall thereafter comply with the final effluent limitations on Total Phosphorous as contained in Condition 10(a) on Page 6 of the subject permit;

4. The permittee shall meet all of the terms and conditions of the permit, except as provided above;

---

* All reports, plans and/or specifications that propose new or modified waste treatment and/or disposal facilities must be approvable and signed, and sealed, by a professional engineer, licensed to practice in the State in which the facilities are to be built.

5. The permittee shall meet all of the terms and conditions of this Enforcement Compliance Schedule Letter.

EPA's exercise of prosecutorial discretion as indicated above will also continue only so long as conditions do not arise which warrant an emergency action under section 504 of the Act or modification of the permit.

The permittee is advised that this Enforcement Compliance Schedule Letter does not preclude the initiation of an action, pursuant to section 505 of the Act, by a third person other than EPA to enforce the permit's requirements to achieve the final effluent limitations by July 1, 1977.

This Enforcement Compliance Schedule Letter does not constitute a waiver with respect to or imply that EPA will not take appropriate enforcement action against the permittee for its failure to (1) achieve the final effluent limitations on and after July 1, 1977, if the permittee does not fully satisfy the conditions set forth above; or (2) fully comply with other applicable statutory, regulatory, permit or other legal requirements.

Unless previously revoked, the effectiveness of this Enforcement Compliance Schedule Letter shall terminate on the date specified above for achievement of the final effluent limitations.

Sincerely yours,

/s/ MEYER SCOLNICK
Meyer Scolnick
Director
Enforcement Division

International Paper Company hereby stipulates and agrees that it will comply with all of the conditions and requirements of this Enforcement Compliance Schedule Letter.

International Paper Company

By: /s/ Name Illegible

Enclosures

cc: Ms. Helen Lee
Regional Hearing Clerk

Mr. William Garvey, Director
Bureau of Standards and Compliance
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12233

James W.B. Benkard, Esq.
Davis Polk & Wardwell
1 Chase Manhattan Plaza
New York, New York 10005

Hon. Greg E. Studen
Assistant Attorney General
State of Vermont
109 State Street
Montpelier, Vermont 05602

Peter S. Paine, Jr., Counsel
Lake Champlain Committee
1 State Street Plaza
New York, New York 10004

Response of Environmental Conservation Agency of the State of Vermont to Defendant's Questionnaire

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action—File No. 78-163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs,

and

H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors,

v.

INTERNATIONAL PAPER COMPANY.

QUESTIONNAIRE TO CLASS MEMBERS

To: All owners and long-term lessee of lakefront property in the Towns of Addison (south of the Crown Point Bridge), Shoreham and Bridport

1. Do you engage in recreational activities involving the South Lake?

X Yes — No

See Note Attached.

2. What activities do you engage in? (Check the box)

X swimming — *See Note Attached.*
X water skiing
X fishing
X boating
other (specify)

3. Does your recreational activity take place in any particular area of the lake?

X Yes — No

4. If you answered yes to question 3, what areas of the lake do you use?

	Ticonderoga Area		Larabees Point
	Kerby Point		Watch Point
	Five Mile Point		Lapans Bay
	Yellow House Point		Plummies Point
X	Chimmney Point		North of Crown Point

5. What amount of time per year do you reside on the South Lake?

	Year-round	
X	Seasonal (Name the season)	*Summer.*
	Other (explain)	*See Attacheu Note.*

6. Approximately how frequently do you engage in recreational activity on the lake?

X	daily		2 to 4 times a week
	3 or 4 times a month		1 or 2 times per season

7. In your view, is the quality or condition of the water the same up and down the South Lake?

X Yes No

8. If your answer to question 7 is "No", please explain your reasons for that view.

9. What use do you make of your property on the South Lake?

1st residence
2d residence
camp
X other *See attached note.*

10. If you are a lessee of lakefront property what is the length of your lease?

5-10 years *N/A.*
10-20 years
over 20 years

11. Have you ever tried to sell your property?

Yes X No

12. Did your contemplated sales price exceed the amount that you paid for the property?

N/A.

Yes No

13. When did you purchase your lakeshore property?

9/19/68.

14. How many feet of lakefront property do you own in the Towns of Addison (south of the Crown Point Bridge), Bridgport and Shoreham?

2,970 feet.

15. Are there any other comments you would like to make about the effect, if any, of the discharge from the International Paper mill on the South Lake? If so, please use the space below. *See Attached Note.*

Dated: Sept. 23, 1981

Mr. Leo C. Laferriere, Commissioner Agency of Environmental Conservation Dept. of Forests, Parks & Recreation

/s/ Leo Laferriere

.....

Name (please print)

Respectfully submitted,

DINSE & ALLEN
College Street
Burlington, Vermont

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attached Note.

Further explanation of questions 1, 2, 5, 9, and 15.

The Department of Forests, Parks and Recreation is a part of the Vermont Agency of Environmental Conservation. The land we own at the Chimney Point Bridge was purchased for future development as a state park. The development potential for this property indicates swimming, water skiing, fishing, boating and other water contact recreational activities. The State Park system is basically a seasonal operation. A day use facility of this type would normally operate from Memorial Day weekend to Labor Day weekend. The Department of Water Resources of this Agency reports that "the IPCo-discharge is currently well within the stringent permit limits established by the State of New York. Based on Vermont's review of the discharge monitoring reports and Vermont's limited sampling of the south lake area, the Water Resources Department would conclude that the effects of the present discharge on the Lake are minimal."

Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Action—File No. 78-163

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs,

and

H. VAUGHIN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE, ELLEN THORNDIKE, WESLEY C. LARRABEE, VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Plaintiff-Intervenors

v.

INTERNATIONAL PAPER COMPANY

ORDER

Upon consideration of the Motion to Allow Appearance and to Strike Request for Exclusion filed by the State of Vermont on March 8, 1983, and the memorandum and Affidavit in support thereof, it is hereby ORDERED:

That said motion be, and the same hereby is, granted. The appearance of the Attorney General of the State of Vermont for the State of Vermont, Department of Forests and Parks, shall be allowed and the request for exclusion previously filed on behalf of the Department of Forests and Parks shall be stricken.

Dated at Burlington in the District of Vermont, this 23rd day of March, 1983.

/s/ ALBERT W. COFFRIN
Albert W. Coffrin
Chief Judge

Letter of Langrock Sperry Parker & Wool to Second Circuit

LANGROCK SPERRY PARKER & WOOL

(Letterhead omitted)

September 25, 1985

Elaine B. Goldsmith, Clerk
UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: *Ouellette* v. *International Paper Company*
Docket No. 85-7506

Dear Clerk Goldsmith:

The enclosed case, *State of Tennessee* v. *Champion International Corporation*, 22 Env't Rep. Cas. (BNA) 1338 (Tenn. Ct. App. 1985), *appeal granted*, (Tenn. 1985), has come to the attention of Plaintiffs-Appellees. Pursuant to Fed. R. App. P. 28(j), it is hereby brought to the attention of this Court and the parties, in support of Plaintiffs-Appellees Argument I, pp. 13-31, that neither the Federal Water Pollution Control Act nor the United States Supreme Court decisions in *Illinois* v. *Milwaukee I & II*, preclude private nuisance actions in the Court of the state of injury.

Enclosed also are remarks of Senator Stafford entered in the Congressional Record on September 12, 1985 (S11305) setting forth legislative history in the form of excerpts from transcripts from the mark ups during 1970 and 1971 of the Clean Air Act and The Clean Water Act. Enclosed with the remarks of Senator Stafford are the transcripts from which he quotes.

These authorities are being submitted in support of Plaintiffs-Appellees' argument at page 29 of their brief that Congress intended the saving clause of the Federal Water Pollution Control Act to preserve rights already enjoyed by citizens.

Very truly yours,

/s/ EMILY J. JOSELSON, ESQ.
Emily J. Joselson, Esq.

EJJ/pm
Encl.

cc: James W. B. Benkard, Esq. w/encl.
Spencer R. Knapp, Esq. w/encl.
Frederick deG. Harlow, Esq. w/encl.
Meredith Wright, Esq. w/encl.
John G. Proudfit, Esq.

CONGRESSIONAL RECORD—SENATE
REMARKS OF SENATOR STAFFORD

S11305

POLLUTION LAWS PRESERVED RIGHTS

September 12, 1985

MR. STAFFORD. Mr. President, it is my custom to avoid issues which are in litigation, not embrace them. But to every rule there are exceptions.

There is now pending before the Second Circuit Court of Appeals a review of the decision by the U.S. District Court for Vermont in the case of *Ouellette* v. *International Paper*, 602 F. Supp. 264 (1985). One of the issues in that case is whether the enactment of the Federal Clean Water Act extinguished rights of action under other laws, including Vermont common and statutory law. Why the question should arise at all is a puzzle to this Senator since the language of the Clean Water Act is quite clear on the subject. Section 505 of the Clean Water Act establishes the right of a citizen to sue to enforce the provisions of the act, then states explicitly that other rights are undisturbed. Subsection (e) states that—

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Despite this clear language, at least one court has held that the act extinguishes some State common law. That court is the Seventh Circuit Court of Appeals, which made such a finding in *Illinois* v. *City of Milwaukee*, 731 F. 2d 403 (1984).

My purpose here is not to review the details of these and other court decisions, but to make available some legislative history which I hope will be helpful in indicating just what was intended by the Congress. This legislative history includes transcripts from the markups during 1970 and 1971 of the Clean Air Act and Clean Water Act.

The citizen suit provision was first adopted in the Clean Air Act and then, about 1 year later, incorporated in the Clean Water Act. Therefore, to completely understand what the members of the Committee on Public Works and the Congress intended, it is necessary to review transcripts and other documents relating to both laws.

The subject of preempting or displacing rights available under other laws arose for the first time on June 4, 1970, at a meeting of the Subcommittee on Air and Water Pollution. The subcommittee was meeting to mark up what was later to become the Clean Air Act. Included in the bill before the subcommittee was a proposal to authorize citizens to file suit to force compliance with pollution control requirements. As the subcommittee members were discussing this proposal, Senator Howard Baker offered an observation and expressed a fear as follows:

SENATOR BAKER. The only question is whether or not you have access to the Federal courts under one of the jurisdictional requirements for diversity or jurisdictional amount or one of the other specialities. So we aren't creating a brand new cause of action. We are, rather, modifying one that already exists.

I think that brings to mind something that we should make sure we fully understand: that is, that we don't limit and circumscribe the right of citizens individually and as a class to do what they can already do by spelling it out here in this statute. If we start spelling out each detail here, the court is going to hold that we have obliterated everything else that the common law created. (Transcript Roll 15, p. 1687.)

The discussion then moves on to other subjects, but a minute or two later, Senator Baker suggests that the bill be amended.

SENATOR BAKER. I think you could also put in a saving clause to the effect that:

"Nothing contained in this Act shall abridge or abrogate any pre-existing right by statute or common law."

I think the courts would permit that. (Transcript Roll 15, p. 1692.)

The transcript shows no direct response to Senator Baker's suggestion at this time, but on July 29, 1970, the subcommittee was meeting again to mark up the proposed Clean Air Act. Senator Baker was absent, but there was a discussion of the meaning of the savings clause:

SENATOR COOPER. If I may ask another question . . . what would be embraced in equitable relief? (Would it affect) any personal rights you may have as a person, for damages.

MR. JORLING. The intention in the language, as I understand it, is to specifically avoid any damage provisions. It is strictly an equitable provision to abate, to halt, to prevent this violation from occurring, and does not address itself to either physical or monetary damages in any way. It is strictly an action to achieve this abatement, if found, of a violation of the schedule of compliance and emission stand (sic) or emission requirement.

It does not go to the issue of damages at all, and that comes out, I think, of the whole philosophy of the Act, and that is, it is very difficult for anybody to prove personal or monetary damage resulting from the effects of air pollution.

MR. BILLINGS. We have reserved the rights of citizens under other common law to seek damages for pollution, if such damages occur. (Transcript Roll 16, p. 0080-81.)

The two staff members responding to the questions from Senators Cooper and Spong were Leon G. Billings and Thomas Jorling. Mr. Billings, who was not a lawyer, was staff director of the Subcommittee on Air and Water Pollution and Senator Muskie's principal aide. Mr. Jorling, a lawyer, was minority counsel to the full committee and the principal aide to the Republican members.

The transcripts contain one further reference to the savings clause, which is a statement by Senator Spong of Senator Baker's original intent. The Members were discussing whether citizens should be required to provide notice to administrative agencies as a precondition to filing suit. There had been earlier subcommittee discussions, and the members were attempting to refresh their recollections, with Senator Muskie observing at one point, "* * * we have gone through this once before. I forget just how we resolved it." (Transcript Roll 16, p. 0088.) Senator Spong recalls the following:

SENATOR SPONG. It is coming back to me now. Senator Baker's concern was that we could be taking a right away from a citizen . . . to go into court. . . . (Transcript Roll 16, p. 0090.)

Following subcommittee and committee markup, the bill was considered by the full Senate on September 21, 1970. As it had in the earlier stages of the legislative process, floor attention focused almost exclusively on the consequences of conferring on citizens an explicit right to sue to enforce pollution laws. Senator Philip Hart of Michigan defended the provision, which was by then section 304 of S. 4358, as "one of the most attractive features of the bill," adding that it would not result in a proliferation of litigation.

The bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordin-

ary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill.

(Legislative history of the Clean Air Act Amendments of 1970, Congressional Research Service, Library of Congress, Washington, D.C., Volume 1, p. 355.)

Senator Hart's remarks, together with the transcripts of the markups, make it clear that Senators believed that, in enacting the Clean Air Act, they were supplementing remedies available to injured parties, not supplanting them.

The House bill contained no comparable citizen suit provision. But with some changes in the Senate language, the House receded. The last sentence of the Statement of Managers on Part of the House in explanation of the section 304, the citizens' suit provision, was the following:

The right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected. (Id. at p. 206.)

During consideration of the Clean Water Act the following year, much less attention focused on the citizens' suit provision. That is due, in part, to the fact that the version contained in the Clean Water Act was identical to what had been enacted in the Clean Air Act, except for changes required because of differences in terminology—for example, discharges of water pollution effluent vice emissions of air pollution.

At this time, several bills were pending in the Congress to expand the rights of citizens to file class action suits. Therefore, some discussion concerned itself with the issue of whether the parenthetical phrase "(or class of persons)" might have the effect of expanding the then current law. On September 21, 1971, the Committee on Public Works held a markup of the proposed Clean Water Act amendments which had been reported by the Subcommittee on Air

and Water Pollution. During the review of the citizens' suit provision, the following exchange took place:

SENATOR COOPER. Do you want to tell us against whom action may be brought and for what causes and then exceptions? Then on page 115, subsection e, you add, "Nothing shall restrict any right which any person (or class of persons) . . .". Is the right of a class of persons only available under the conditions set out in e, in other words, when they have a right under State statute or common law?

MR. MEYER. Well, it is a parenthetical phrase.

MR. JORLANG (sic). The intention is, as in the Air Bill, to avoid in this provision any of the complexities that are raiesed with cross-action (apparently class-action) suits on the basis that this is a provision that authorizes only equitable relief. There is no provision for the recovery of damages nor for requirement of showing of damages.

The provision, subsection e, provides merely that this section, the authorization granted in this section, in no way affects any rights a person has, whether or not acting alone or as a class, under any other law, statutory or common, for relief against a pollutor (sic). This would normally mean that if there are some damages, standard common law damages, and a person would like to join with a class of people that suffered similar damage, this does not prevent them from doing so. (Transcript Roll 17, p. 1617-18.)

This understanding of the savings clause was also reflected in the committee report accompanying S. 2770, which explained what was to become section 505(e) as follows:

It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages. (Legislative History of the

Water Pollution Control Act Amendments of 1972, Congressional Research Service, Library of Congress, Washington, D.C., p. 1499.)

The issue of what impact, if any, the enactment of the Clean Water Act would have on the availability of other statutory or common law remedies was apparently not discussed further. However, it would seem that further discussion was unnecessary. From the first mention of the issue by Senator Baker during the subcommittee markups of the Clean Air Act to the last recorded mention of the subject in the Senate Public Works Committee report on the Clean Water Act, the attitude and intent of the members was remarkably consistent. Not once was there ever any doubt as to what they intended or disagreement as to its correctness. In every discussion of the matter, it was clear that all other rights—whether State or Federal, statutory, or common law—were to be preserved. The clarity of the repeated statements to this effect and the unanimity of agreements on the proposition made further discussion meaningless.

I might observe that this Senator was a Member of the other Chamber when the Clean Air Act amendments were adopted and a member of the Senate Committee on Public Works when the Clean Water Act amendments were considered and approved. Speaking only for himself, this Senator can recall no occasion on which it was ever suggested at the time of their consideration that the enactment of the Clean Water Act or the Clean Air Act would diminish the rights of injured parties. On the other hand, I can find a record replete with unequivocal statements by Members and staff that these rights were to be preserved, combined with clear indications of affirmation and agreement by other Senators and Representatives.

In the face of a record such as this, it seems impossible for any reasonable person to conclude that the Congress

intended, by the enactment of these laws to provide the public with less protection from personal injury than it had before. Such a conclusion is directly at odds with every statement made during the long and detailed consideration of these laws. Nevertheless, some persons apparently have reached such a conclusion in the past. I would hope that in light of the information I have just provided, they will reconsider and correct earlier decisions.

Mr. President, the complete transcripts to which I have referred are available through the documents room of the Committee on Environment and Public Works should any person wish to review them.

Letter of Davis Polk & Wardwell to Second Circuit

DAVIS POLK & WARDWELL

(Letterhead omitted)

October 3, 1985

Hon. Elaine B. Goldsmith
Clerk
UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: *Ouellette* v. *International Paper Company, Docket No. 85-7506*

Dear Ms. Goldsmith:

On behalf of International Paper Company, defendant-appellant in the above-referenced appeal, we submit this letter in response to a letter dated September 25, 1985 submitted by plaintiffs-appellees to this Court. Plaintiffs-appellees' letter seeks to present two supplemental "authorities" for this Court's consideration. Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, we take this opportunity to respond to that letter.

First, plaintiffs-appellees cite an intermediate state court decision, *Tennessee* v. *Champion International Corp.*, 22 Env't Rep. Cas. (BNA) 1338 (Tenn. Ct. App. 1985), *appeal granted,* (Tenn. S.Ct. 1985), to support their view that the Federal Water Pollution Control Act ("FWPCA") authorizes actions involving interstate water pollution claims to be brought in the courts and under the common law of the state in which the alleged injury occurred. In *Champion,* the State of Tennessee brought suit in a Tennessee state court against a North Carolina paper plant, alleging that the plant's discharges into an interstate river flowing between Tennessee and North Carolina, constituted a nuisance under Tennessee law. The court held that the suit could be brought under Tennessee law.

Initially, we point out that the Tennessee Supreme Court has decided to exercise its discretion to grant an appeal to review the intermediate court's decision in *Champion.* Second, the intermediate court in *Champion* acknowledged that its holding was contrary to that of the Seventh Circuit in *Illinois* v. *Milwaukee,* 731 F.2d 403 (7th Cir. 1984), *as amended,* Nos. 77-2246 & 81-2236 (7th Cir. May 29, 1984), *cert. denied sub nom. Scott* v. *City of Hammond,* 53 U.S.L.W. 3529 (January 21, 1985) ("Illinois v. Milwaukee (III)"). As set forth more fully at pp. 15-30 of International Paper Company's Brief dated July 22, 1985 ("IPCo. Mem.") and at pp. 2-15 of its Reply Brief dated September 4, 1985 ("IPCo. Reply"), the holding of *Illinois* v. *Milwaukee* (III) and the position of the United States which fully supported the Seventh Circuit's ruling as amicus curiae on Illinois' subsequent petition for a writ of certiorari correctly interpret the FWPCA and should be followed in this case.

Finally, there is a sharp factual distinction between the *Champion* decision and the case at bar: in *Champion,* the complained of pollutants—dissolved solids, foam, odor and color—were not regulated by North Carolina, the state of discharge, while Tennessee, the state where the alleged harm occurred, regulated those pollutants. By contrast, in the case at bar, there has been no allegation that International Paper Company is discharging pollutants not regulated under New York law or its federal permit that would be subject to regulation under Vermont law.

The second source submitted by plaintiffs-appellees for consideration by this Court consists of certain remarks by

Senator Stafford from Vermont entered in the Congressional Record on September 12, 1985 commenting explicitly on this appeal and urging that this Court interpret the FWPCA to permit plaintiffs-appellees (comprised of Vermont citizens and the State of Vermont) to maintain this action in a Vermont court under Vermont law. According to Senator Stafford, the legislative histories of the Clean Air Act ("CAA") and the FWPCA makes it "clear that all other rights-whether State or Federal, statutory, or common law-were to be preserved." 131 Cong. Rec. S11306 (Sept. 12, 1985).

Senator Stafford's personal view of the legislative histories of the CAA and FWPCA, which were enacted respectively fifteen and thirteen years ago, are not entitled to any weight by this Court in accordance with the well-established principle that:

> "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. . . . Such statements represent only the personal views of these legislators, since the statements were made after passage of the Act." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Goolsby* v. *Blumenthal*, 581 F.2d 455, 460 (5th Cir. 1978), *cert. denied sub nom. Goolsby* v. *Miller*, 444 U.S. 970 (1979). *See also United States* v. *Clark*, 445 U.S. 23, 33n.9 (1980) ("the views of some Congressmen as to the construction of a statute adopted years before by another Congress have very little, if any, significance").

Senator Stafford has sought unsuccessfully on two prior occasions to amend the savings clause of the FWPCA to enact into law what he asserts in his remarks quoted by

plaintiffs-appellees *is* the existing law, as supposedly shown in the legislative history. Both bills proposed to permit expressly the application of the "law of the state in which [the plaintiff] resides or the State in which the claim arose" in cases involving water pollution. Those bills were submitted in 1983 and in 1985, after the decision in *Illinois* v. *Milwaukee* (III). The 1983 bill was not enacted by the Congress and the 1985 bill was amended in the Committee on Environment and Public Works of the United States Senate to expressly delete the language proposed by Senator Stafford. Senator Stafford is the chairman of the Committee on Environment and Public Works.

Finally, examination of the legislative history cited by Senator Stafford does not support his interpretation of the FWPCA. The cited excerpts support International Paper Company's position that the savings clauses of the FWPCA merely preserve, not create, state law that existed when the FWPCA was enacted. For example, Senator Baker stated that the CAA savings clauses should preserve "any preexisting right by statute or common law." Comments of Senator Baker before Subcommittee on Air and Water Pollution (June 4, 1970), *reprinted in* 131 Cong. Rec. S11305 (Sept. 12, 1985). As more fully set forth in IPCo.'s Mem. at pp. 16-23 and IPCo.'s Reply at pp. 10-12, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) and *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972), establish that at the time of passage of the FWPCA, as well as the CAA, an action could not be brought under state law to redress alleged interstate pollu-

tion. Thus, there were no "pre-existing" common law rights that could be "saved" by the FWPCA savings clauses.

Respectfully submitted,

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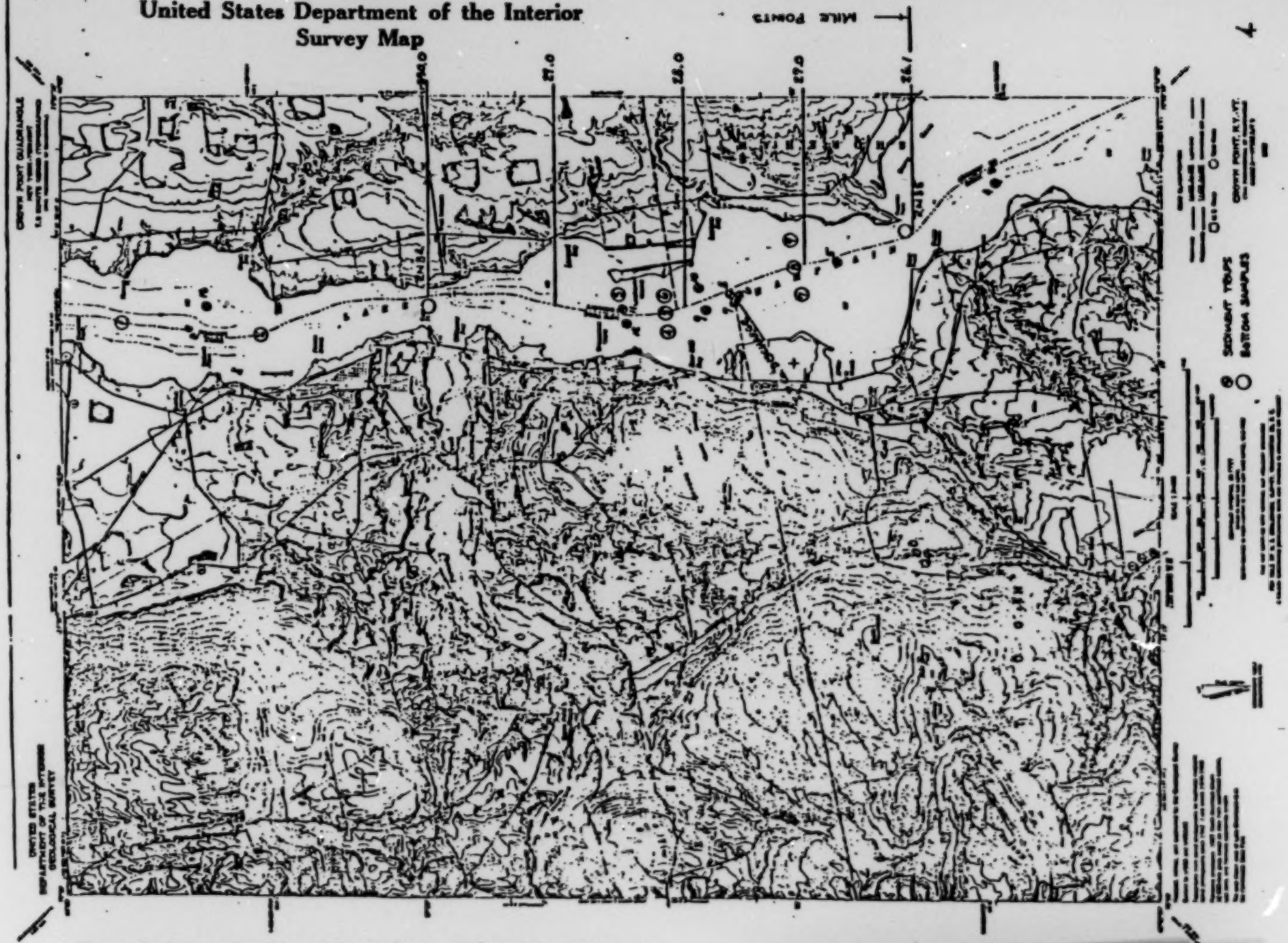
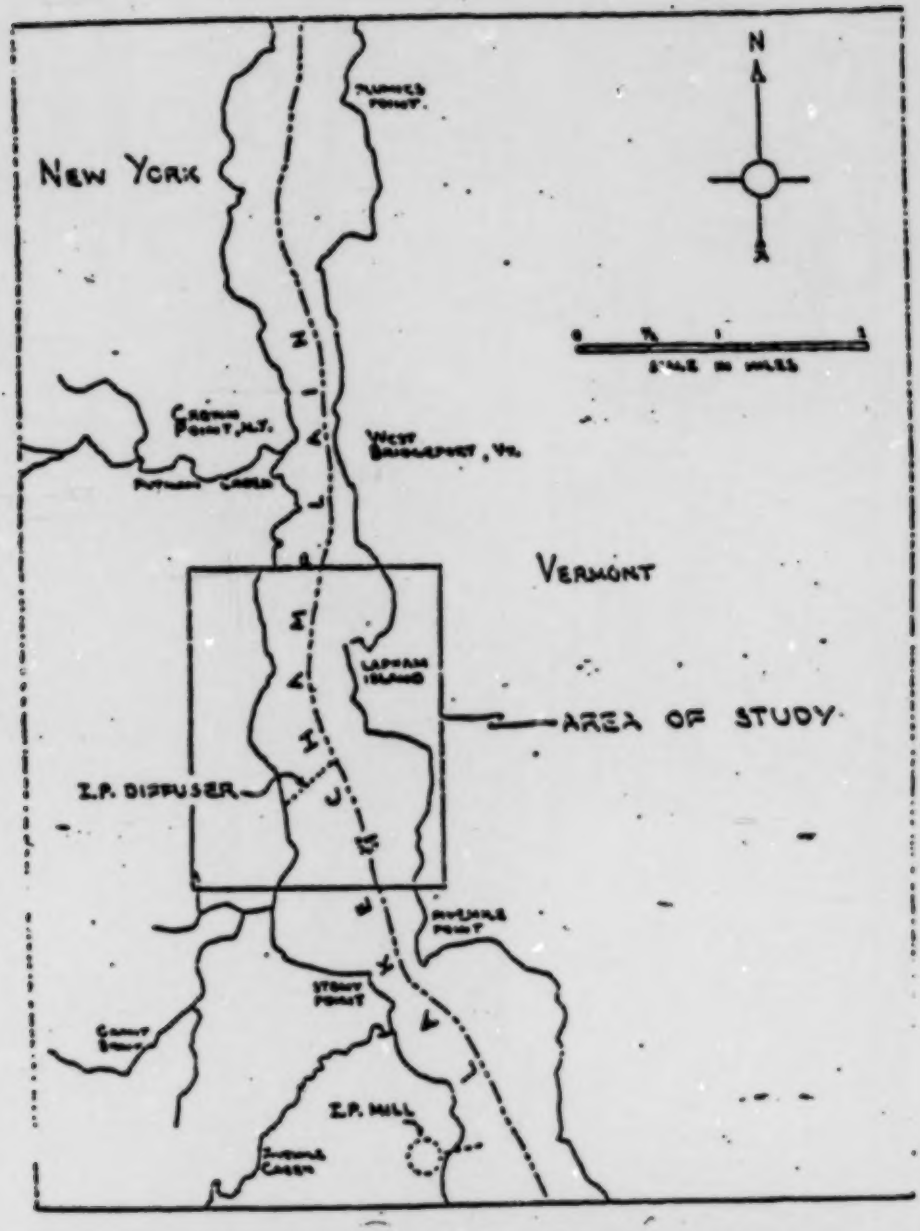
United States Department of the Interior Survey Map



From *Sediment Studies of South Lake Champlain*, Richard Haupt, p. 4 (1976). Produced by defendant in response to plaintiffs' interrogatories on January 11, 1980.

Location Map



From *Performance of Waste Treatment Facilities at International Paper Company's "New Mill" at Ticonderoga, N.Y.*, Hydroscience, Inc., Figure 1 (1972). Produced by defendant in response to plaintiffs' interrogatories on January 11, 1980.

(5)

No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY, *Petitioner*,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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25 P

Question Presented

Does the Federal Water Pollution Control Act authorize a nuisance action alleging pollution of an interstate body of water to be brought against a discharger in any state where an impact of the discharge is claimed, under the laws of such state?

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IN THE

Supreme Court of the United States

October Term, 1985

No. 1233

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE, EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR. and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

Petitioner International Paper Company ("IPCo"),* the defendant below, respectfully submits this brief in support of its request for relief from the judgment of the United States Court of Appeals for the Second Circuit which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin, U.S.D.J.), denying IPCo.'s motion to

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* The caption of the case in the Court contains the names of all the parties to the proceedings in the court below. (The State of Vermont, as a riparian owner, has been joined as a plaintiff.)

dismiss respondents' first cause of action, which relates to the liquid discharges of IPCo.'s plant into Lake Champlain.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in the Appendix to the Petition (A1-3).* The opinion of the District Court is reported at 602 F. Supp. 264 (D. Vt. 1985) and is set forth in the Appendix to the Petition (A4-25). The judgment of the Court of Appeals was entered November 4, 1985 (A26-27).

The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statute and Rules Involved

Sections 103, 309, 401, 402, 505 and 510 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1253, 1319, 1341, 1342, 1365 and 1370 are set forth verbatim in the Appendix to the Petition (A28-49).

Statement of the Case

Procedural History of the Current Litigation

This is a class action commenced in Vermont's Addison County Superior Court on July 5, 1978 by certain residents of Vermont who own riparian lands on the Vermont side of Lake Champlain, a body of interstate water which forms part of the boundary of Vermont and New York. On July 25, 1978, it was removed to the United States District Court in Vermont. The complaint contains two "causes of action." The first cause of action, which is the subject

* "A" citations are to the Appendix to the Petition for a Writ of Certiorari; "JA" citations are to the Joint Appendix filed on May 2, 1986.

of this petition, claims that discharges of treated effluent from IPCo.'s plant in Ticonderoga, New York, into Lake Champlain "constitute a continuing nuisance to the Plaintiffs." Respondents seek $20,000,000 in compensatory damages, $100,000,000 in punitive damages, and injunctive relief which would require IPCo. to restructure completely its water treatment system (JA 27-34). Respondents' second cause of action claims damages and injunctive relief for air pollution and is not at issue here (JA 34-37).

In April 1980, the District Court certified, for purposes of the water pollution claims, a plaintiff class comprising Vermont owners of lakeshore property in three townships of the South Lake area of Lake Champlain. The District Court later added the State of Vermont as a riparian landowner (JA 181).

On June 22, 1981, petitioner moved to dismiss respondents' first cause of action pursuant to Fed. R. Civ. P. 12(c) and 56(b), in part on the authority of this Court's decision in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (*"Milwaukee II"*). In *Milwaukee II*, this Court held that federal common law, which it had earlier held preempted the application of state common law in disputes over interstate waters, *see Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) (*"Milwaukee I"*), was itself preempted by the FWPCA. As Lake Champlain is an interstate body of water, petitioner urged that both federal and state nuisance claims were barred. Respondents resisted, arguing that their state law claims of nuisance survived.

On March 27, 1984, the Seventh Circuit held, in the latest round of the litigation between Illinois and Milwaukee, *Illinois* v. *Milwaukee*, 731 F.2d 403 (1984), *as amended*, Nos. 77-2246 and 81-2236 (May 29, 1984) (*"Milwaukee III"*), that, in view of *Milwaukee I* and

Milwaukee II, there was no basis in the FWPCA for a state other than the state where the source was located (the "source state") to apply its common law to abate discharges into interstate waters, and further indicated that an action to abate could only be maintained in the federal or state courts in the source state. On January 21, 1985, this Court denied petitions for certiorari. *Scott* v. *City of Hammond*, 105 S. Ct. 979 (1985).

On February 5, 1985, notwithstanding the decision in *Milwaukee III*, the Vermont District Court in this case denied petitioner's motion to dismiss, holding, directly contrary to *Milwaukee III*, that the FWPCA authorized nuisance suits to be brought in any court and under the law of any state where the alleged effects of a discharge occur.* The District Court certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and stayed further proceedings pending disposition by the Second Circuit.

The Second Circuit affirmed in a one-page *per curiam* opinion "essentially for the reasons set forth in [the District Court's] . . . thorough opinion which [we] adopt in all respects. . . ." (A3). It is this judgment from which petitioner seeks relief.

Prior Proceedings

The present case is the latest development in a history that goes back to at least 1970. In that year, Vermont invoked the original jurisdiction of this Court to bring an action on behalf of itself and its citizens against the State of New York and IPCo alleging that the discharge of liquid waste into Lake Champlain from IPCo's plant at Ticon-

* The District Court also denied petitioner's motion to dismiss on two separate grounds that are not presented for review here.

deroga, New York, constituted a nuisance. *See Vermont* v. *New York*, 406 U.S. 186 (1972); *see also Vermont* v. *New York*, 417 U.S. 270 (1974). Negotiations ensued among Vermont, IPCo and the State of New York and the Federal Environmental Protection Agency ("EPA") which resulted in a settlement agreement ("the 1974 Settlement Agreement") among the parties which spelled out in considerable detail iimits upon the effluent from the IPCo plant, technological changes to be made in the discharge system from the IPCo plant, and extensive procedures for monitoring IPCo's compliance (JA 122).*

Contemporaneous with the 1974 Settlement Agreement, the EPA issued, pursuant to the FWPCA, a draft National Pollution Discharge Elmination System ("NPDES") permit for IPCo's Ticonderoga Mill. That draft permit incorporated the discharge standards contained in the 1974 Settlement Agreement as well as additional requirements (JA 146). Pursuant to Sections 309 and 402 of the FWPCA, 33 U.S.C. §§ 1319 and 1342 (A29-34, A41-51), the EPA sent notice of the draft permit to the State of Vermont as an "affected state" (JA 65). Officials of

* The parties to the original action arrived at an agreed upon consent decree which the Special Master submitted to this Court to have it adopted as the order and judgment of this Court. Questions, however, were raised as to the appropriateness and feasibility of having this Court undertake to supervise the continuous monitoring of compliance with the terms of the settlement, *Vermont* v. *New York*, 417 U.S. 270 (1974), and this Court suggested that the parties might consider other possible means to resolve their dispute, including resort to procedures under the New England Interstate Water Pollution Control Compact, Pub. L. No. 292, 61 Stat. 682 (1947), *codified at* New York Environmental Conservation Law, §§ 21-0101 *et seq.* (McKinney's 1984); 10 Vermont Statutes Annotated §§ 1331 *et seq.* (Equity 1984); or to an interparty settlement. *Id.* at 277-78. The parties further negotiated among themselves, with the result that a settlement agreement was finally arrived at, and filed with this Court, which obviated the need for Court supervision of the settlement (JA 63).

Vermont as well as representatives of The Lake Champlain Committee (the principal private environmental organization in the Champlain Valley) participated in all subsequent negotiations among the EPA, New York and petitioner (JA 65). The parties eventually reached complete agreement and the EPA issued a final NPDES permit for petitioner's mill on March 17, 1977 (JA 69).* Petitioner installed a $3,000,000 addition to its waste water treatment system to achieve compliance with certain of the permit requirements (JA 67).

Petitioner's permit is one of the most stringent in the country and contains detailed limits on nearly every component of the mill's discharge (JA 70). Petitioner makes detailed monthly reports on the performance of the waste water treatment system, including precise daily readings for numerous parameters, to New York, EPA, and Vermont (JA 70).**

Although the complaint contains a separate "count" alleging that the mill's discharges into Lake Champlain "consistently . . . violated the terms" of the NPDES permit (JA 30), the focus of the plaintiff's nuisance claim here is that the continued discharge of liquid material into Lake Champlain from IPCo's plant constitutes a common law nuisance and gives rise to a claim for both punitive and

* Upon approval by the EPA of New York's permitting program the NPDES permit was adopted by New York as a New York State Pollution Discharge Elimination System ("SPDES") permit (JA 70).

** On the basis of those reports and its own observations, the Environmental Conservation Agency of the State of Vermont stated in writing to the District Court on September 23, 1981 that the "IPCo. discharge is currently well within the stringent permit limits . . . [and] . . . the effects of the present discharge on the Lake are minimal" (JA 180).

compensatory damages and for injunctive relief, whether or not the mill complies with the settlement and the EPA permit.

Summary of Argument

The decisions below represent a fundamental misunderstanding of the legislative goals underlying the FWPCA. Through a misapplication of statutory interpretation, the courts below adopted a construction of the FWPCA and of this Court's precedents which would produce a parochial patchwork of conflicting multistate regulation of interstate waters and of "point sources" which discharge into such waters. Such a reading defeats the purpose of the comprehensive system of federal and source state regulation of dischargers delineated by the FWPCA, and effectively disrupts the overall scheme of regulation embodied in that statute.

Exposing sources which must discharge effluents into interstate waters to the varying statutory and common laws of all states whose boundaries touch on waters into which those discharges are made will make it difficult, if not impossible, for these dischargers to determine what constitutes an acceptable effluent discharge level. They will face a post facto threat of punitive and compensatory damages, premised upon "vague and indeterminate nuisance concepts", *Milwaukee II*, 451 U.S. at 317, from the respective states' laws, as well as mandatory and prohibitory injunctions imposing potentially conflicting and irreconcilable discharge standards. These tendencies are exacerbated by the decision to allow common law principles of liability and remedy to be applied by courts sitting in any state whose citizens are alleged to have been injured by such discharges. Such a process threatens to render meaningless the permit scheme of the FWPCA, since dischargers into interstate waters will remain subject to the various nuisance laws of the various riparian and downstream states and the various interpreta-

tions of such laws by a multiplicity of court systems despite full compliance with permits issued by the EPA and by the state agency where they are located.

The decisions below, which directly conflict with the decision of the Seventh Circuit in *Milwaukee III*, would also embroil states in harmful and disruptive disputes over basic interests of state sovereignty engendered by extraterritorial regulation of dischargers, which was one of the very concerns that led this Court in *Milwaukee I* to affirm the paramountcy of federal law in interstate water disputes. Their practical effect is to create chaos and uncertainty, replacing a comprehensive system of regulation of interstate waters with a disjointed and disruptive melange of multistate regulation.

ARGUMENT

The Regulatory Scheme Embodied in the FWPCA and the Decisions of This Court Do Not Permit or Contemplate Regulation of Discharges Into Interstate Waters by the Courts or Under the Law of a State Other Than That Which Is the Source of the Discharge.

The decision of the Vermont District Court reflects a misapprehension of the effect of this Court's decisions in *Milwaukee I* and *Milwaukee II* which leads to a misinterpretation of the scheme of federal regulation of discharges into interstate waters established by the FWPCA and of the language of the FWPCA. This Court's precedents make clear that the uniquely federal nature of interstate water disputes requires the displacement of varying state statutory and common law with a comprehensive body of federal law governing interstate pollution. The FWPCA reflects an all-encompassing federal scheme to regulate the use of navigable and interstate waters, a scheme which assigns a specific but limited role to source state regulation. By allowing

multistate regulation of interstate waters, applied through state common law as well as statutory law, the decisions below not only misapply the FWPCA but also misread Congress' intent in enacting the statute.

A. The 1972 Amendments to the FWPCA Establish a Federal/State Partnership Which Recognizes the Paramountcy of Federal and Source State Interest.

Prior to the passage of the 1972 amendments to the FWPCA, this Court had recognized the need to preempt state common law regulation of interstate water disputes in favor of the development of a uniform and comprehensive body of federal regulation. In *Milwaukee I*, this Court held that "Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." 406 U.S. at 107 n.9 (quoting *Texas* v. *Pankey*, 441 F.2d 236, 241 (10th Cir. 1971)).* Recognizing that the then-existing FWPCA failed to provide a comprehensive federal scheme governing interstate water disputes, this Court concluded that the creation of federal common law was both appropriate and necessary.

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* It seems, at least in retrospect, that *Milwaukee I* (and perhaps *Ohio* v. *Wyandotte*, 401 U.S. 493, 498-99 n.3 (1971), which we discuss *infra* at p. 15 n.*), may have reflected dissatisfaction with the regulatory scheme that existed before the FWPCA amendments. *See Environmental Protection Agency* v. *State Water Resources Control Board*, 426 U.S. 200, 202-03 (1976). That scheme, articulated in the original 1948 Federal Water Pollution Control Act, 62 Stat 1155, 33 USC §§ 1151 et seq., and deemed "inadequate in every vital aspect" by the Senate Committee on Public Works, S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Legislative History of the Clean Water Act Amendments of 1972, p. 1425, relied on state regulation of water pollution, supplemented by federal regulatory statutes and proceedings before this Court in the exercise of its original jurisdiction.

That interstate water disputes are resolved by recourse to paramount federal law was implicitly reaffirmed in *Milwaukee II* when this Court held that, by the 1972 amendments to the FWPCA, Congress had "occupied the field" of the regulation of discharges into interstate waters and thereby in turn displaced federal common law. The 1972 amendments, which represented a "complete rewriting" of the existing statute, House Debate on H.R. 11896 (March 27, 1982) (remarks of Representative Jones), *reprinted in* 1 Legislative History of the Clean Water Act Amendments of 1972 (hereafter "Leg. Hist."), pp. 359-360, effectively created a new body of federal law governing all aspects of interstate pollution, "an all encompassing program of water pollution regulation." *Milwaukee II*, 451 U.S. at 318. The administrative scheme established by Congress, which focuses upon a permitting procedure directed at individual dischargers, so-called "point sources",* imposes minimum pollution control standards on each such point source and insures uniformity in the administration and enforcement of those minimum standards.** The Act provides for civil penalties for violations of its requirements or of the standards imposed by permits issued under its authority, § 309(a) of the Act, 33 U.S.C. § 1391(a) (A29-32), as well as suits by affected persons and by the governors of affected states to compel compliance, § 505(a) and (h) of the Act, 33 U.S.C. § 1365(a) and (h) (A51, A54), but does not provide a private right of action for damages. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1980).

* "Point source" is defined in § 502(14) of the Act, 33 U.S.C. § 1362(14), as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

** The statutory scheme that is embodied in the 1972 amendments, and the profound change in the approach to water discharge regulation these amendments embodied, is carefully set forth in *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 202-209.

Although the statute was intended to reflect a national policy of pollution control, it does not ignore the interests of riparian states in the control of the use of navigable waters. The Act, however, makes a fundamental distinction between the authority of the state in which a source is located and a non-source state which may be affected by the discharge. The Act recognizes that a source state has a direct interest in the regulation of a point source within its jurisdiction and provides that where the law of the source state imposes more stringent requirements than are imposed by the federal EPA, those more stringent state requirements shall constitute the standard to be met by the discharger. FWPCA § 510(1), 33 U.S.C. § 1370(1) (A55). Thus, although the Act contemplates that federal regulations will impose a uniform minimum standard on water discharges, it recognizes and fosters the application of more stringent standards imposed by the source state.*

* In dealing with this obvious source of potential tension, the Act plainly supports federal paramountcy by making the EPA Administrator the primary arbiter, subject to federal court review, of whether a source state's permitting program in fact embodies requirements "more stringent" than the EPA's and in fact meets the standards of the Act, including an appropriate response to the concerns of affected non-source states; it also requires that a state desiring to create a permitting program of its own satisfy the EPA Administrator that it is qualified to carry out such a program effectively. § 402(b), 33 U.S.C. § 1342(b) (A42-45). At the same time, the Act makes clear that, although a point source must comply with both the requirements of federal regulation and more stringent requirements imposed by a source state, it will be subject to a *single* permit and a *single* permitting authority. As this Court recognized in *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 206, where the EPA has approved the issuance by a state of a permit embodying more stringent standards than EPA requirements, the state permit shall effectively "supersede" the federal permitting authority. § 402(c), 33 U.S.C. § 1342(c) (A45-46). Furthermore, numerous courts have recognized that the federal statute requires a discharger to seek a permit only in the source state and not in any

(footnote continued on following page)

The Act deals differently with the interests of non-source riparian states. It requires the Administrator of the EPA to notify, *inter alia*, every state that might be affected by a discharge of his intent to adopt a permit, and to allow any state to be heard in opposition to issuance of the permit. § 401(a)(2), 33 U.S.C. § 1341(a)(2) (A36-37). Section 402(b), 33 U.S.C. § 1342(b) (A42-45), imposes a similar requirement upon the source state, directing that if a state desires to administer its own permit program for discharge into navigable waters within its jurisdiction, it shall give notice, an opportunity for hearing and the right to submit recommendations to any state whose waters might be affected by a discharge from within its borders and mandating further that should a state in its permitting process reject the recommendation of any other state, it shall notify the EPA Administrator, who is empowered to prevent issuance of the state permit. In addition, both the governor and citizens of a state injured by a discharge occurring in another state may sue in the federal judicial district where the source is located to enforce effluent limitations established under the Act. *See* § 505(a), (c) and (h), 33 U.S.C. § 1365 (a), (c) and (h) (A51-54).*

(footnote continued from preceding page)

other state which might be affected by a discharge. *See, e.g., Tennessee* v. *Champion International Corporation*, No. 85-36-I, slip. op. at 7-8 (S. Ct. Tenn. 1986); *Lake Erie Alliance For Protection of Coastal Corridor* v. *U.S. Army Corp. of Engineers*, 526 F. Supp. 1063 (W.D. Pa.), *aff'd*, 707 F.2d 1392 (3d Cir. 1983), *cert. denied* 464 U.S. 915 (1983).

* To the extent that the instant action is an action to enforce the terms of the permit granted to petitioner (or of the regulations adopted by the EPA or by some state), it would seem to be subject to this forum requirement. Such an action would not—and could not—seek damages or "abatement" beyond compliance with the permit or the regulations. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1980).

The FWPCA thus recognizes—and deals with—a potential conflict among riparian states or between such states and the federal regulations, as to the appropriate use of interstate waters. In adopting this model, the Congress rejected polar positions—on the one hand, that no discharge into interstate waters is permissible if any riparian state regards it as impermissible, and, on the other, that the source state has untrammeled authority unilaterally to establish permissible limits on the use of its boundary waters. The FWPCA effectively recognizes the paramount federal interest by providing both a means to deal finally with conflicting state interests and a minimum uniform federal standard applicable to all interstate waters, without ignoring the interests of both the source state and other riparian states.*

B. The Decision Below Misconstrues the Savings Clauses of the FWPCA.

The Vermont District Court correctly concluded that, after *Milwaukee I* and *Milwaukee II*, "state law . . . cannot

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* In the Brief for the United States as Amicus Curiae submitted in opposition to the Petition for Certiorari in *Milwaukee III*, the Solicitor General concluded that the Act:

> "creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. The federal government establishes threshold pollution control requirements (*see, e.g.*, 33 U.S.C. 1311, 1312, 1316, 1317), subject to state decisions to 'adopt more stringent limitations through state administrative processes, [or] establish such limitations through state nuisance law, and apply them to in-state discharges.' Milwaukee II, 451 U.S. at 328. . . . Under this partnership, the states must defer to the federal government's choice of minimum national requirements, but they reserve the unqualified power to determine to what degree they wish to impose more stringent limitations within their borders. *If, as Illinois argues, one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed.*" *Id.* at 10 (emphasis added).

control interstate water pollution controversies" absent congressional authorization. 602 F. Supp. at 270 (A17). Despite this recognition of the paramount federal interest in interstate water regulation, however, the Vermont District Court went on to hold, on the basis of a strained interpretation of the legislative history of the FWPCA, that the savings and state authority provisions of the FWPCA—§ 505(e), 33 U.S.C. § 1365(e) (A53) and § 510, 33 U.S.C. § 1370 (A55), respectively—"authorize actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred" and in the courts of that state. *Id.* at 274 (A2). Such a construction, we submit, has no support in the statute's language or legislative history or in the regulatory scheme.

Section 510(2), 33 U.S.C. § 1370(2) (A55) provides in pertinent part that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." Section 505(e) (A53), provides that

> "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ."

The Vermont District Court's conclusion that §§ 505 and 510 authorize a state or its residents to bring an action in their own courts under their state's laws against an out-of-state discharger was based on its view that Congress must have believed such an action was available at the time the FWPCA was under consideration in the Congress. According to the Vermont court, the fact that *Milwaukee I* was not decided by this Court until after the FWPCA was

drafted implies that, in enacting the FWPCA, Congress viewed as the current state of the law the suggestion in *dicta* in this Court's decision, in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498-99 n.3 (1971), that state law would govern an interstate water dispute and therefore intended to preserve such state jurisdiction over discharges into interstate waters.

This conclusion represents a misapplication of statutory interpretation. There is nothing in the legislative history of the FWPCA to suggest that Congress viewed *Wyandotte* as representing the "state of the law" at either the time the FWPCA was drafted and debated or at the time it was passed.* In *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), this Court had made it clear that interstate water disputes were governed by federal common law. Six months *before* final passage of the FWPCA, *Milwaukee I* expressly rejected any suggestion in the *Wyandotte* footnote to the contrary and held explicitly that federal law, not state law, controlled interstate water disputes. *See* 406 U.S. at 102 and n.3. *Milwaukee I* was decided on April 24, 1972; the FWPCA was

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* The precise meaning of footnote 3 to the *Wyandotte* opinion is unclear. *See Milwaukee I*, 406 U.S. at 102 n.2 (the conclusion in *Wyandotte* "was based on the preoccupation of that litigation with public nuisance under Ohio law"). *Wyandotte* clearly bespoke a rejection of routine reliance upon this Court's original jurisdiction to referee controversies over discharges into interstate waters. It also recognized that, although the principles of decision applicable where a state invoked this Court's original jurisdiction to seek redress against pollution emanating from another state are federal law principles, they drew upon the common law of nuisance developed by the states. In view of *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) which was decided on the same day as *Erie* v. *Tompkins*, 304 U.S. 64 (1938), it seems at least unlikely that this Court intended to overrule *sub silentio* its established principle that regulation of interstate waters was a matter of "federal common law".

enacted by Congress on October 18, 1972. During that six month period, the Senate and House Conference Committee thoroughly debated the Senate and House versions of the bill, ultimately issuing a conference report; the House and Senate then debated and enacted the conference bill. The suggestion that Congress "relied on" the *Wyandotte* footnote and was unaware of the *Milwaukee I* holding is so speculative that it cannot be a guide to Congressional intent. Looking at the state of facts (and law) that existed on the date the FWPCA was passed, the § 505(e) savings clause plainly could not "save" any state law remedy with respect to discharges into interstate waters, since no such state jurisdiction existed. And § 510, according to *Milwaukee II*, applies only to state regulation of *in-state discharges*. 451 U.S. at 327-28.*

Moreover, to construe § 505(e) as reflecting an intent of Congress to give renewed vitality to the *Wyandotte*

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* The Vermont District Court relied heavily on this Court's observation in *Milwaukee II*, 451 U.S. at 327 n.19, that, since the suggestion in the *Wyandotte* footnote had not yet been rejected during much of the "legislative activity" leading up to the Act, Congress could not have intended to preserve a federal common law remedy. 602 F. Supp. at 269 (A14). However, this fails to justify the conclusion that Congress *did* intend to revive a particular state law remedy by § 505(e), 33 U.S.C. § 1365(e); in fact, this Court has made plain in *Milwaukee II* its view that any such intention was unlikely:

> "The fact that the language of § 505(e) is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation, see n.21 *supra*, indicates that *it does not reflect any considered judgment about what other remedies were previously available* or continue to be available under any particular statute." 451 U.S. at 329 n.22 (emphasis supplied).

Cf. Middlesex County Sewerage Authority v. *National Sea Clammers Association, supra*, 453 U.S. at 15-16 (noting in another context that the savings clause language is "quite ambiguous").

footnote by recognizing the legislative jurisdiction, whether by common law or statute, of a non-source riparian state to regulate discharges from a source in another state, requires the conclusion that Congress intended to recognize (and affirm) such jurisdiction without in any way dealing with the effects of such purported power on the already complicated interplay of federal and source state jurisdiction embodied in the FWPCA's permitting scheme.* It is inconceivable that Congress would have failed to provide any procedure to deal with conflicts between the requirements developed by the source state and those developed by judges and juries in other riparian states at the same time that it provided a very specific procedure to reconcile differences between the federal and the source state permitting authorities and an equally specific procedure to ensure that the interests of non-source riparian states are represented in the permitting process.** In short, if one assumes that the FWPCA is intended to affirm the legislative competence of non-source riparian states to impose their own judgments (and those of their courts and juries) on out-of-state dischargers, one is forced to con-

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* If the FWPCA is construed as expressing a Congressional intent not to preempt a downstream state's legislative jurisdiction over the discharges into interstate waters of a point source located in another state, the decisions of its courts would be made in the exercise of competent state law and arguably would not be subject to review even by this Court, except perhaps on theories of discriminatory burden. *See, e.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1969); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 262 (1984).

** The ironic consequence of the Vermont District Court's view of § 505(e) is that although the source state, in framing its permit for a domestic source, is required to take account of the interests of other affected riparian states, non-source riparian states have no statutory obligation to consider the source state's interests in exercising control by statute or common law over dischargers located in the source state. Under this view of the FWPCA, a downstream state's authority to regulate out-of-state dischargers is significantly less constrained than that of the source state.

clude that Congress affirmed a power which threatens to overwhelm the regulatory scheme it carefuily prescribed.

There is nothing in the language of the FWPCA or in its legislative history which supports, much less compels, this construction of the Act. Certainly, nothing in the legislative history of the FWPCA supports the view that Congress believed that a state or its residents could bring an action in their courts under their state's laws against an out-of-state discharger. *Milwaukee I* represented the "state of the law" for almost six months before the 1972 amendments to the FWPCA were adopted; even prior to *Milwaukee I, Hinderlider* had established that federal, not state, common law governs interstate water disputes. Any logical reading of § 505(e) (A53), in the context of this Court's precedents and in light of the lack of legislative history supporting a different construction, compels the conclusion that Congress intended no more than generally to prevent Section 505 from being read to extinguish any existing rights the states had, such as the traditional right of a state to regulate discharges within its borders, that might otherwise have been viewed as preempted if Section 505 were given an overly expansive reading.*

In contrast to the Vermont Court, the Seventh Circuit in *Milwaukee III* approached its analysis of the FWPCA and of Sections 505 and 510 (A53, A55) with the recognition that interstate water pollution "is a controversy of federal dimensions, implicating the conflicting rights of states and

* As this Court observed in *Milwaukee II*, 451 U.S. at 328-29, and *Middiesex County Sewerage Authority* v. *National Sea Clammers Association, supra,* 453 U.S. at 15-16 (1980), Section 505(e) deals in terms only with possible preemptive implications of the language of Section 505, not the preemptive effects of the FWPCA taken as a whole.

inappropriate for state law resolution," 731 F.2d at 410,* and concluded, based on the legislative history, that the FWPCA did not provide any basis for any state other than the source state to exercise jurisdiction over interstate waters, although it might support the power of the courts of the source state to supplement the FWPCA by applying the common (or statutory) law of that state to provide a remedy for actual damages to riparian interests injured by discharges into a source state's waters. 731 F.2d at 414.

Analyzing the "saving clauses" of the FWPCA in light of the statute's purpose, the Seventh Circuit first concluded that, given the emphasis of the FWPCA on the "role of the state where the discharge in question occurs" and "the conflict and confusion which could result from any different construction", 731 F.2d at 413, Section 510(1), 33 U.S.C. § 1370(1) (A55), which provides that a state may adopt discharge limitations more stringent than the federal limitations, must be limited to state-imposed limitations "with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state." *Id.* The court reasoned

* In the Brief for the United States as Amicus Curiae submitted in opposition to the Petition for Certiorari in *Milwaukee III,* the Solicitor General observed that *Milwaukee I* "left no doubt that the law of one state could not be relied upon to abate a discharge in another state." Brief for the United States at 7. In the Solicitor General's view, *Milwaukee II* did not specifically address the question whether state law could be invoked to limit discharges in a second state. He urged, however, that the "opinion [in *Milwaukee II*] lends no support . . . to the contention that such state law remedies were revived by the decision in *Milwaukee II,* and, indeed, the discussion there strongly suggests that such remedies are not available." Brief for the United States at 8. After passage of the 1972 amendments, which created a more comprehensive federal scheme of regulation, the Solicitor General concluded, the reasons underlying the Court's decision in *Milwaukee I* that federal law, not state law, applies in interstate water disputes "appear considerably stronger." *Id.* at 11.

that in § 510(2), 33 U.S.C. § 1370(2) (A55), which provides that the jurisdiction of the states was not impaired, "Congress intended no more than to save the right and jurisdiction of a state to regulate activity *occurring within* the confines of its boundary waters." *Id.* (footnote omitted; emphasis added).

As we have noted, the Seventh Circuit nevertheless construed the FWPCA as preserving a state's (or an individual's) right to bring a state-based common law action against a discharger in the courts of the source state under the laws of that state. *See, e.g., Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973). It concluded that "the reference in § 1365(e) [§ 505(e)] to statute or common law, like the reference to right or jurisdiction of a state in § 1370 [§ 510], is to a statute or the common law of the state in which the discharge occurs." 731 F.2d at 414 (footnote omitted). But the court found it "implausible that Congress meant to confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on dischargers in [or from] State I by applying the statutes or common law of State II." 731 F.2d at 414. If the "savings clause" were so read, the court observed, the "uniformity and state cooperation envisioned by the Act" would be undermined. 731 F.2d at 414. Additionally, it said,

> "[f]or a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful

> discharge into an interstate body of water. Any permit issued under the [FWPCA] would be rendered meaningless." *Id.**

On Illinois' petition for rehearing, the court rejected that state's request that it be permitted to proceed in federal district court in Illinois. The court amended its earlier opinion to clarify that only the federal and state courts in the source state have jurisdiction to apply the law of the source state to disputes over discharges that produce effects in interstate waters.** In so doing, the Seventh Circuit responded to suggestions in the legislative history of the FWPCA that Congress intended, in enacting the FWPCA, not to foreclose existing private rights of action for damages. *See, e.g.*, S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971), *reprinted in* 2 Leg. Hist at 1499:

> "It should be noted, however, that [§ 505] would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a

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* In its recent decision in *Tennessee* v. *Champion International Corp.*, No. 85-36-I, slip op. at 13-14 (S. Ct. Tenn. 1986), the Tennessee Supreme Court adopted the reasoning of the Seventh Circuit in *Milwaukee III* and determined that Tennessee could not exercise jurisdiction over a paper mill located in South Carolina and operating under an EPA approved permit, despite the effects of the mill's discharges on Tennessee. The court concluded that the FWPCA's permitting process provides ample opportunity to respond to non-source states' interests and that therefore a discharger should be entitled to rely on the standards established in the source state's permit.

** "Nothing in our decision precludes the application of Wisconsin or Indiana law by state or federal courts *in one of those states* at the suit of out-of-state parties affected by discharges in that state." *Illinois* v. *Milwaukee*, Nos. 77-2246 & 81-2236, slip op. at 4 (7th Cir. May 29, 1984) (emphasis added).

> defense to a common law action for pollution damages."

The construction of the Act arrived at by the Seventh Circuit gives heed to that desire without doing violence to the regulatory scheme of the FWPCA or inviting the multistate conflict of regulation that gave it concern.

It might, of course, be argued that the comment in the Senate Report is no more than a paraphrase of the language of the "savings clause", § 505(e), 33 U.S.C. § 1365(e), and that, in view of *Milwaukee I*, it does not "save" state-based rights of action which were held by that decision to have been preempted.* Alternately, it could be argued that respect for the Report's statement merely counsels preservation of such private rights for damages caused by interstate water pollution as might be implied, as a matter of "interstitial" federal common law, to supplement the scheme of the FWPCA. This Court has made clear, however, that it does not find in the FWPCA or in its legislative history any basis to imply a private federal common law action to recover damages or enforce any other common law remedies. *Milwaukee II; Middlesex County Sewerage Authority* v. *National Sea Clammers, supra*, 453 U.S. 1 (1981); *see also Conner* v. *Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1747 (1985) (actions for "maritime torts" preempted by FWPCA); *United States* v. *Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981) (same). In these circumstances, the Seventh Circuit's suggestion that federal and state courts in the source states may apply source state law to provide a damage remedy in the case of a discharge into interstate

* Given that the FWPCA regulates waters other than the interstate waters referred to in *Milwaukee I*, but which might nevertheless be subject to preemption if Congress chose to exercise its full power, this interpretation would not render meaningless § 505(e), 33 U.S.C. 1365(e) (A53), or ignore the statement in the Senate Report.

waters that causes injury, is to be seen, not as a grudging obeisance to a considered decision of the Congress, but as a carefully crafted effort to afford a private damage remedy in addition to the civil enforcement and penalty provisions set forth in the Act in the manner which best comports with the overall statutory scheme.

Assuming as we do that the FWPCA, in combination with *Milwaukee I* and *Milwaukee II*, did not altogether preempt damage actions based on a source state's common law with respect to a source discharging into interstate waters, it is clearly necessary to confine such actions to federal or state courts sitting in the source state if the federal interest expressed in *Milwaukee I* and *Milwaukee II* to avoid interstate conflict and the allocatory judgment of Congress in defining the roles of source states and non-source states in the regulation of interstate waters are not to be frustrated.* As this Court observed in *Milwaukee II*, the common law of nuisance is "vague" and "indeterminate". 451 U.S. at

* The Vermont District Court noted that under familar choice of law and diversity jurisdiction principles, courts in one state routinely apply another state's substantive law and federal courts routinely apply state law. 602 F. Supp. at 270 (A10). What the Seventh Circuit saw in the totality of the scheme of the FWPCA, however, was not a choice of law principle, but a forum choice which was necessary to avoid an unacceptable multiplication of regulation. As the United States stated in its amicus brief in *Milwaukee III:*

> "This case is not an ordinary tort suit; it involves the question of pollution of interstate waters which this court repeatedly has held to require special treatment. There is not presented a choice-of-law question in the sense considered in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Rather, it is clear that federal law governs (see *Milwaukee I*, 406 U.S. at 105 and n.7; *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), and state law is preempted to the extent required by federal law. For the reasons discussed above, the federal

(footnote continued on following page)

317. The potential for conflict that is unavoidably associated with the application of such a body of regulation is, therefore, as much involved in allowing it to be applied by decisions in a variety of states as in subjecting a single discharge source to the substantive law of a multitude of states.

Congress recognized the need to ensure that local courts exercise jurisdiction over regulatory actions relating to local pollution sources when, in § 505(c), it required that suits under *federal* law to enforce permit limits and suits by governors of affected states to enforce permit limits be brought only in the judicial district in which the source is located.* The general emphasis in the FWPCA on the partnership between federal regulation and more stringent regulation by the source state in the control of local pollution sources, as well as the federal concern to prevent conflicting multistate control of the use of interstate waters, supports the Seventh Circuit's conclusion that state-law based actions aimed at discharges into interstate waters must be based solely on the law of the source state and confined to the federal and state courts of the

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(footnote continued from preceding page)

statutory scheme here has left room for a suit under state law against a discharger in that state, but not in another state." Brief for the United States at 13 n.12.

* Even in these narrow circumstances, Congress was concerned about the potential for the development by the courts of inconsistent policy implicit in its decision to allow citizen suits to compel compliance with the Act, although it concluded that this danger was minimized in such cases because the issues would be simple and there would be a complete factual record. S. Rep. 92-414, 92d Cong., 1st Sess. 80 (1971), *reprinted* in 2 Leg. Hist. at 1498. Obviously, there would be a far greater potential for the creation of inconsistent policies if courts of several states were applying common law standards to regulate a single discharge source.

source state.* Indeed, given Congress' express direction in § 505(c) of the Act that actions based on federal law be brought in the source state's courts, the implicit direction of sutis based on source state law to the same forum is an *a fortiori* case.

C. Federal Preemption of Non-Source State Regulation of Discharges Into Interstate Waters Must Extend to State Law-Based Common Law Claims by Private Parties as Well as the State Itself.

In an attempt to distinguish *Milwaukee III* from the present case, the Vermont District Court assigned weight to the fact that this case involved only private parties seeking application of nuisance law that was "not [intended] to regulate the activity of neighboring states. . . ." 602 F. Supp. at 271 (A19). As such, the court considered the respondents' nuisance claim for substantial actual and punitive damages and injunctive relief to pose at most only a "purely incidental" intrusion upon the sovereignty of the discharger's state, *id.* at 271 (A19), which "merely supplement[s] the standards and limitations imposed by the Act." *Id.* (A17).

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* In this case, there is an independent ground for requiring that plaintiffs' actions be tried in the New York federal court. As we have noted, "Count Two" of plaintiffs' "First Cause of Action" alleges that IPCo's dscharges violate the NPDES permit applicable to the plant (JA 30). It seems clear that such a claim is one which "arises under" the FWPCA and therefore must be brought in the judicial district where the source is located. Under established principles of federal pleading, a plaintiff is required to incorporate in his action all claims for relief which are based upon the same transaction or nexus of facts to avoid subsequent preclusion of any claim based on that transaction. *See, e.g., U.S. Industries, Inc.* v. *Blake Const. Co. Inc.*, 765 F.2d 195, 204 (D.C. Cir. 1985); *Kozman* v. *Trans World Airlines*, 236 F.2d 527, 536 (2d Cir. 1956); *Restatement (Second) of Judgments* § 19 (1982). Since plaintiffs' claim that IPCo's discharges violate the NPDES permit must be brought in the Northern District of New York, it would seem that they must also bring any damage claims in the same action.

Contrary to the suggestion of the Vermont District Court, the relief sought here—more than a hundred million dollars in punitive and compensatory damages and injunctive relief which may require reconstruction of the mill—cannot fairly be described as an "incidental intrusion" upon the sovereignty of New York or of the United States. Nor can it be justified as a "mere supplement" to the FWPCA. If Vermont could "supplement" the control of the EPA and New York over a New York discharger by imposing, through its nuisance law, new and possibly infeasible treatment requirements, either in the form of equitable relief or damage awards which require process changes to avert future awards, the discharger would be subjected endlessly to increased expenses, operational disruption, perhaps even termination, and the FWPCA permitting process would at very least be seriously undermined.

This Court has long recognized that where Congress has comprehensively regulated a field of activity, its action preempts all state regulation of that field, absent a clear indication that Congress intends to preserve some state regulatory role at the cost of tension between federal and state powers. *See Pacific Gas & Elec.* v. *Energy Resources Comm'n,* 461 U.S. 190 (1983); *Silkwood* v. *Kerr-McGee,* 464 U.S. 239 (1983).* And this Court held, as early as *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 246-47 (1958), that such comprehensive regulation

* In *Silkwood* v. *Kerr-McGee,* a majority of this Court sustained state common law competence to impose traditional tort remedies, including compensatory and punitive damages, against an operator of a nuclear plant in spite of the comprehensive federal regulation of nuclear plant safety embodied in the Atomic Energy Act and its successors, because they found in the Price Anderson Act and its legislative history a clear congressional purpose to preserve such remedies in addition to the federal regulatory scheme. 464 U.S. at 248-58. The legislative history of the FWPCA provides no such evidence of Congressional intent.

preempts state remedies as well as state regulations. *See also Chicago & North Western Transportation* v. *Kalo Brick & Tile Co.,* 450 U.S. 311, 324-27 (1981).

As we have argued above, there is no indication that in enacting the FWPCA and its comprehensive scheme to regulate discharges into navigable waters, Congress intended to preserve, much less to create, common law jurisdiction in non-source states over discharges into interstate waters. Absent such an expression of congressional intent, the Vermont common law nuisance remedies, which respondents seek to invoke against a New York discharger, by way of injunction and punitive and compensatory damages, are preempted as fully as any other putative Vermont regulation of discharges into interstate waters from an out-of-state source.

CONCLUSION

The decision below places petitioner, and others similarly situated, in the untenable position of being subject to regulation by the EPA, the state in which they are located, and the potentially conflicting statutes, regulations and case law of all the states with borders contiguous with the interstate bodies of water into which their discharges are made. It replaces a uniform and comprehensive scheme of regulation that establishes a workable partnership between the federal government and the source state with a disruptive and fragmentary system of multistate regulation, which is fraught with the potential for unresolvable interstate conflict. It should be reversed.

Dated, New York, New York
May 19, 1986

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No. 85-1233 (9)

In The
Supreme Court of the United States
October Term, 1985

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does the Federal Water Pollution Control Act preempt an action by property owners, in the Vermont federal district court under Vermont common law, for damages to their Vermont lakeshore properties caused by the discharge of pollutants into the boundary waters between New York and Vermont by a private business enterprise located in New York?

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No. 85-1233

In The

Supreme Court of the United States

October Term, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

Respondents Harmel Ouellette and Lila Ouellette, *et al.* ('Respondents'), respectfully pray that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit, which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin, Chief Judge), entered February 5, 1985.

STATUTE AND RULES INVOLVED

In addition to the Statutes cited by Petitioner, Respondents also cite Section 101 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1251 and 40 C.F.R. § 122.5(c), which are set forth verbatim in the Supplemental Appendix to Respondents' Brief (App. 1-4).

COUNTERSTATEMENT OF THE CASE

Prior Proceedings

In 1970, the State of Vermont brought an original action in this Court against the State of New York and International Paper Company ("IPCo."), for pollution discharges into Ticonderoga Creek from Petitioner's "Old Mill," a kraft paper mill located within the Village of Ticonderoga, New York. The United States, through the Environmental Protection Agency ("EPA"), intervened. At the time the lawsuit was brought, the Old Mill had discontinued operations and the "New Mill" (which is the subject of the instant action) was then under construction, at a site four miles north of Ticonderoga. *Vermont v. New York,* 406 U.S. 186 (1972), 408 U.S. 917 (1972), 409 U.S. 1103 (1973).

After trial before a Special Master, Vermont, New York, EPA and IPCo. agreed on a proposed settlement The proposal, however, was rejected by the Supreme Court on the grounds that it required ongoing supervision by the Court. 417 U.S. 270 (1974). A new settlement, embodied in two agreements known as the Two-Party Agreement (between Vermont and IPCo.) (JA 88)[1] and the Four-Party Agreement (between Vermont, New York, EPA, and IPCo.) (JA 121), called for the lawsuit to be dismissed without prejudice (JA 89, 122-23), and this Court did so. 419 U.S. 955 (1974).

By these agreements, the State of Vermont consented not to sue for any damages to its waters, shores, adjacent areas and atmosphere occurring *prior* to the date the amended complaint was dismissed (October 29, 1974) (JA 96, 128-29). It also agreed not to propose a limitation in the *first* National Pollutant Discharge Elimination System ("NPDES") permit for certain pollutants stricter than those set forth in the settlement agreements (JA 98-99, 113).

However, the parties specifically agreed that:

> Nothing herein shall be construed as affecting any claims or right of any citizens or residents of the State of Vermont that may exist against any party to No. 50, Original.

¶ IV(F) of the Two-Party Agreement (JA 101). The Four-Party Agreement contained an almost identical provision. ¶ VI(F)(JA 135). The Four-Party Agreement also provided:

> Any issues or claims not resolved by this Agreement, or the two-party agreement, may be asserted in any forum having jurisdiction.

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[1] "JA" citations are to the Joint Appendix filed on May 2, 1986. "A" citations are to the Appendix contained in Petitioner's Petition for Certiorari, filed with this Court on January 22, 1986.

¶ VI(H) (JA 135). The Second Circuit rejected Petitioner's argument, not renewed here, that these agreements somehow foreclosed the claims set forth in this lawsuit (A 3).

The Present Proceedings

Respondents are 162 owners of lands on the shores of Lake Champlain within the towns of Shoreham, Bridport and Addison, Vermont (JA 45). Respondents use their properties primarily for residential and recreational purposes, but also for certain commercial uses such as rental cottages. The State of Vermont, as a landowner, is a member of this class action and appears through its Attorney General (JA 17). Petitioner is a New York corporation with its principal place of business in New York, and is registered to do business in the State of Vermont (JA 27-28,38). It owns and operates the New Mill, a kraft paper mill on the New York shores of Lake Champlain, across the lake from Respondents' properties.

Lake Champlain is a navigable body of water and is the largest fresh water lake east of the Great Lakes. It extends from Whitehall, New York, into Canada. The Vermont-New York border is the middle of the deepest channel of Lake Champlain. "An Act . . . Declaring What Shall be the Boundary Line Between the State of Vermont and the State of New York . . . ." *Vermont Laws of 1790;* N.Y. State Law, § 4 (McKinney 1984).

Petitioner discharges wastes from its mill into Lake Champlain through a diffusion pipe. The location of the pipe, running in a straight line through New York waters toward Vermont and ending approximately 200 feet from Vermont waters, is shown on two maps at JA 197-98.

This suit was instituted in 1978, in Vermont state court as a class action, seeking common law remedies for losses resulting from water and air pollution caused by Petitioner's mill. Over Respondents' objection, Petitioner removed the action to the United States District Court for the District of Vermont, pursuant to 28 U.S.C. § 1441(a) (JA 1-3, 46).

In the first cause of action, Respondents seek relief from discharges of pulp- and paper-making wastes which are "foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to Respondents' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use" (JA 29). These discharges "interfere with [Respondents'] use and enjoyment of their property and have diminished and will continue to diminish the fair market value and rental value of their property" (JA 29).

Count I alleges that discharges from Petitioner's mill into Lake Champlain constitute a "continuing nuisance" (JA 29); Count II alleges that Petitioner has violated its NPDES permit by discharging pollutants into the Lake in excess of the amounts specified in the permit[2] (JA 29-31); Count III alleges that Petitioner's discharges constitute an unreasonable riparian use (JA 31-32); Count IV alleges that its discharges are negligent (JA 32-33); and Count V alleges that such discharges are malicious, willful, and un-

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[2]Petitioner's contention that it has not violated its permit is not supported by the present record, which shows violations of the permit pursuant to the ECSL and other violations, as well (JA 68-70). Respondents stand ready to prove additional violations at trial.

dertaken with reckless and wanton disregard of Respondents' rights (JA 33-34). Respondents seek compensatory and punitive damages, as well as injunctive relief (JA 29-34, 43-44; A 9). Respondents' second cause of action concerns air pollution (JA 34-37), and is not at issue here.

On June 22, 1981, Petitioner moved for dismissal and summary judgment on Respondents' first cause of action, pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure (JA 13). On February 5, 1985, Chief Judge Coffrin denied Petitioner's motion. *Ouellette v. International Paper Co.*, 602 F.Supp. 264 (D.Vt. 1985) (*"Ouellette"*) (A 18).

Chief Judge Coffrin ruled that the FWPCA, 33 U.S.C. §§ 1251 *et seq.*, did not preempt this common law nuisance action, under Vermont law, between private parties alleging injuries arising out of water pollution. The court thoroughly analyzed the language and legislative history of the statute, this Court's decisions in *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (*"Milwaukee I"*), and *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*"Milwaukee II"*), and the Seventh Circuit's opinion in *Illinois v. Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *as amended*, Nos. 77-2246 and 81-2236 (7th Cir. May 29, 1984), *cert. denied sub nom. Scott v. City of Hammond*, 105 S.Ct. 979 (1985) (*"Milwaukee III"*). Based on such analysis, Chief Judge Coffrin concluded that nothing in the FWPCA or the common law impairs the longstanding rights of private persons, injured by the out-of-state actions of private entities, to sue in the state of injury for resulting harm.

Petitioner argued the applicability of *Milwaukee III*, involving suits by and between states and their political subdivisions.[3] There, the Seventh Circuit held that the FWPCA precludes the application of one state's common or statutory law to determine liability and afford a remedy for discharges in another state. *Id.*, 731 F.2d at 414. Chief Judge Coffrin rejected this argument. He first noted the significant difference in the posture of the parties to each action: *Milwaukee III* involved suits between quasi-sovereign entities, while the instant action is solely between private parties. *Ouellette*, 602 F.Supp. at 271 (A 18). Thus, Chief Judge Coffrin found that, unlike the case in *Milwaukee III*, here "[t]here is little or no possibility that this litigation will escalate into a conflict between different state entities." *Id.* (footnote omitted) (A 18).

Chief Judge Coffrin further distinguished the instant case by pointing out that "the common law action involved here does not directly implicate the regulatory powers of the states in which the parties are located." *Id.* (A 18). He noted that Respondents are not seeking to impose "legislatively defined standards or limitations" on Petitioner, which was precisely the relief sought by the State of Illinois. *Milwaukee III*, 731 F.2d at 407. Here, Respondents seek

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[3]The *Milwaukee III* decision involved three actions consolidated on appeal, two by the State of Illinois against several Wisconsin cities and municipal corporations, and the other a putative class action suit brought by Illinois citizen William J. Scott, against other Wisconsin cities and political subdivisions. 731 F.2d at 404-06. As the Seventh Circuit pointed out, "[i]t may well be significant . . . that, except for the case in which Scott is Plaintiff, these are attempts by a state to regulate municipalities of another state in the discharge of their public responsibilities." *Id.* at 407. Notably, Scott's complaint was then dismissed by the Seventh Circuit, on the ground that he had suffered insufficient harm to confer standing. *Id.* at 414-15.

only compensation for injuries to, and protection against interference with, the use and enjoyment of their properties. *Ouellette,* 602 F.Supp. at 271 (A 18). "A state's nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare, and property rights of its own residents." *Id.* at 271-72 (A 19). The court stressed that affording citizens such relief is a uniquely local concern, traditionally founded on state law. *Id.* at 270 (A 15).

Quite apart from these important factual distinctions, Chief Judge Coffrin also rejected the legal analysis employed by the Seventh Circuit. Although describing the *Milwaukee III* decision as "an admirable attempt to deal with the difficult issues concerning the role of state law in controlling the pollution of interstate water," *id.* at 268 (A 10), Chief Judge Coffrin nevertheless characterized that court's conclusions as "logically inconsistent" and "inherently contradictory," *id.* at 270-71 (A 16-17), since nothing in this Court's decisions, the FWPCA, or the Act's underlying policies, supports the application of the common law of the state in which the polluter is located, while mandating the wholesale preemption of the law of the affected state.

For all the foregoing reasons, Chief Judge Coffrin declined to follow the holding of *Milwaukee III,* and denied Petitioner's motion to dismiss Respondents' first cause of action. On May 20, 1985, Chief Judge Coffrin certified for interlocutory appeal three issues[4] pursuant

[4]These three issues were: (1) whether the FWPCA preempts this common law action; (2) whether the settlement agreements entered into by the State of Vermont in *Vermont v. New York,* 419 U.S. 955 (1974), barred this action; and (3) whether Respondents have standing to sue under general nuisance law. (A 2). The court of appeals affirmed on all three issues. (A 3).

to 28 U.S.C. § 1292(b), and stayed all further proceedings with respect to the first cause of action, pending the decision by the court of appeals (JA 20).

The court accepted Petitioner's interlocutory appeal, and thereafter affirmed the district court's denial of Petitioner's motion to dismiss in a brief *per curiam* opinion, "essentially for the reasons set forth in [the district court's] thorough opinion which we adopt in all [relevant] respects . . ." (A 3). Petitioner seeks review of the court of appeals' decision only on the first of these three certified issues.

SUMMARY OF ARGUMENT

The courts below correctly ruled that the FWPCA, 33 U.S.C. §§ 1251 *et seq.*, did not preempt state common law nuisance actions between private parties involving injuries arising out of interstate water pollution. The courts thoroughly analyzed the language and legislative history of the statute, this Court's decisions in *Milwaukee I* and *Milwaukee II,* and the Seventh Circuit's opinion in *Milwaukee III,* and concluded that nothing in the FWPCA or the common law impairs the longstanding rights of private persons, injured by the out-of-state actions of private entities, to sue in the state of injury for resulting harm.

Petitioner's first argument, that such a result interferes impermissibly with the dictates of federalism, lacks merit. Pet.Br.8.[5] Concerns of state sovereignty simply

[5]"Pet.Br." citations are to the Brief of the Petitioner, filed with this Court on May 19, 1986.

do not arise where private parties sue each other for injuries resulting from wrongful conduct. State law has historically been relied upon to resolve such interstate disputes, without implicating concerns of federalism. Equally unconvincing is Petitioner's argument that permitting Respondents to seek state common law remedies causes unwarranted interference with the regulatory scheme. Pet.Br.7 Respondents are not seeking to regulate Petitioner's activities; rather, they are simply utilizing traditional private remedies to redress the injuries caused by Petitioner's conduct. This Court's decisions in *Milwaukee I* and *Milwaukee II* require no different result.

Secondly, the FWPCA did not preempt this common law suit based on Vermont nuisance law. Nothing in the Act expressly preempts such relief. Indeed, the Act and its legislative history expressly preserves state law remedies. Further, applying the preemption analysis this Court has prescribed, preservation of Vermont common law to redress pollution-caused injuries neither renders compliance with the Act impossible, nor impedes the realization of the Act's full purposes and objectives; rather, such remedies complement those objectives.

Third, Respondents agree with the legal analysis employed by the United States, through the Brief of the Solicitor General, insofar as it concludes that Respondents' common law remedies are not preempted by the FWPCA or the decisions of this Court. However, to the extent that the Solicitor General argues that Respondents' prayers for punitive damages and injunctive relief are governed by New York rather than Vermont common law, Respondents disagree, and maintain that Vermont common law is applicable to the entire action.

Finally, there is nothing in the Act or the common law to support Petitioner's novel claim that Respondents may not seek relief in Vermont, where the injuries occurred. Quite the contrary, a Vermont federal court exercising diversity jurisdiction is a wholly appropriate forum for this action.

ARGUMENT

I. INDIVIDUAL CITIZENS' HISTORIC INTEREST IN OBTAINING REDRESS FOR INJURIES CAUSED BY THE WRONGFUL ACTS OF OTHERS REMAINS UNAFFECTED BY THE DECISIONS IN MILWAUKEE I AND MILWAUKEE II.

Brought by Vermont property owners against a New York corporation registered to do business in Vermont,[6] this quite ordinary lawsuit sounding, ***inter alia***, in nuisance and negligence, arises out of real and tangible injuries to Respondents' health, and to their use and enjoyment of their Vermont properties, caused by Petitioner's pollution-generating activities. Although Petitioner's liability stems from its activities on the New York shores of Lake Champlain, the injuries indisputably occurred in Vermont, approximately one to two miles across the Lake (JA 197, 198). Petitioner's attempts to exploit the interstate aspect of this litigation and characterize it as raising prohibitive concerns of federalism are obfuscatory and without merit. Indeed, to disable Vermont courts from hearing this ac-

[6] *See generally* 11 V.S.A. §§ 2101-2110 (1984), and 12 V.S.A. §§ 851-858 (1973 & Supp. 1985), establishing that by registering to do business in Vermont, Petitioner has tacitly consented to the jurisdiction of Vermont courts for actions to redress injuries which occur in Vermont.

tion, and to require deferral to New York courts, would offend the basic tenet of federalism: equality among sovereign states.

Preliminarily, it should be understood that under both New York and Vermont choice-of-law principles, Vermont common law would apply to this action.[7] *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915 (1978); *Ouellette*, 602 F.Supp. at 270 (A 16); *Marra v. Bushee*, 447 F.2d 1282, 1283 (D.Vt. 1971). Thus, it is only if some federal principle dictates application of New York law that it can be applied. Respondents maintain that no such federal principle exists, and that Vermont law therefore governs.

It is beyond dispute that citizens have historically sought judicial redress in the courts and under the laws

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[7]Chief Judge Coffrin rejected the Seventh Circuit analysis that would have looked to New York choice-of-law principles to determine which jurisdiction's common law applied:

> The Seventh Circuit's position . . . creates a choice-of-law rule that deviates, without legislative authorization, from well-settled choice of law principles. [*Milwaukee III*] would, in settling disputes over interstate pollution, mandate that, where state law was sought to be applied, courts apply the law of the state from which the pollution emanates regardless of the states' choice-of-law principles. Yet the FWPCA provides no support for this deviation from the rule that, in a diversity case, a federal court must apply choice of law principles of the state in which the court sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) . . . . *See also Day v. Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) ("A federal court is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.).

Ouellette, 602 F.Supp. at 270 and n.4 (A 16).

of the state of injury, even though the initiating action may occur in another state.[8] The invocation of state law in such instances does not conflict with, or even implicate, concerns of federalism:

> A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, for maintenance of a nuisance, for blasting operations, and for negligent manufacture.

Young v. Masci, 289 U.S. 253, 258-59 (1933) (citations omitted).

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[8]*See generally Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (allowing libel suit in New Hampshire notwithstanding fact that neither party resided there and only few copies of offending magazine were circulated there, since New Hampshire had significant interest in redressing injuries occurring within state); *Nevada v. Hall*, 440 U.S. 410, 422-23 (1979) (full faith and credit clause no bar to suit in California court, under California law, against State of Nevada by California residents injured in California); *Watson v. Employers Liability Assurance Corp., Ltd.*, 348 U.S. 66, 72-74 (1954) (Louisiana not precluded from applying its own statute authorizing direct action against liability insurer for injuries occurring in that state, although policy sued on was negotiated and issued in Massachusetts); *Pacific Employers Insurance Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 502-03 (1939) (California not precluded from applying its own worker's compensation act to injury of Massachusetts employee working in California); *Young v. Masci*, 289 U.S. 253, 258-59 (1933) (New York may apply own statute making New Jersey owner of automobile liable for negligence of agent operating automobile in New York); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) (Michigan automobile manufacturer liable to ultimate purchaser injured in New York due to design defects).

Indeed, the protection of citizens against unwarranted injuries to their persons or properties, from pollution-generating activities or otherwise, is uniquely within the police power of the states, enforced in part through the application of state common law remedies. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2378 (1985) (health and safety matters, here regulation of blood donor centers, "primarily, and historically, a matter of local concern") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328, 343 (1973) ("[s]ea-to-shore pollution [is] historically within the reach of the police power of the States"); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497-98, 510 (1971) (state law appropriate remedy for interstate water pollution, as exercise of police power); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) (regulation of pollution-generating activities and provision of tort remedies uniquely within state's police powers).[9] As such, Petitioner clearly "may be held responsible according to the law of [Vermont] for injurious con-

[9]See generally *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1207 (4th Cir. 1986); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985); *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159, 162 (3d Cir. 1984); *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C.Cir. 1984), *cert. denied*, 105 S.Ct. 545 (1985); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984), *cert. denied sub nom. Chevron U.S.A., Inc. v. Sheffield*, 105 S.Ct. 2686 (1985).

sequences" which occur here. *Young v. Masci, supra*, 289 U.S. at 259.[10]

The fact that Petitioner has chosen a navigable and interstate body of water into which to discharge its effluent does not deprive Respondents of their common law right to sue privately for negligence or the maintenance of a nuisance. Petitioner's argument, based on its reading of *Milwaukee I* and *Milwaukee II*, that prohibitive concerns of federalism require dismissal of this action, simply does not withstand close analysis.[11] Those cases, involving disputes between quasi-sovereigns seeking to regulate each other's water-polluting activities, are wholly inapposite to the private dispute at hand.

In *Milwaukee I*, this Court held that federal common law was available to a sovereign state suing the political subdivisions of another state, where the former sought to regulate the latter's pollution-causing activities in interstate waters. *Id.*, 406 U.S. at 93, 104-05. *See also Milwaukee II*, 451 U.S. at 309. As more fully explained in *Milwaukee II*, however, this Court resorted to the federal common law of nuisance as a "necessary expedient," *id.*, 451 U.S. at 314, only because in *Milwaukee I* the dictates of federalism precluded Illinois from pursuing, in state court, its claims as a quasi-sovereign against the political

[10]As the United States points out, Petitioner has itself repeatedly maintained that it would be subject to suit in Vermont, under Vermont law, for injuries it causes to Vermont property owners. U.S.Br. 7-10 and nn. 6-11.

[11]This argument also contradicts the previous position taken by Petitioner. *See* n.10, *supra*.

subdivisions of a sister state.[12] *Milwaukee I*, 406 U.S. at 94-98, 104; *Milwaukee II*, 451 U.S. at 309, 325. *See also Missouri v. Illinois*, 180 U.S. 206, 241 (1901) (cited in *Milwaukee I*).

Since no adequate federal statutory remedy then existed, *Milwaukee I*, 406 U.S. at 103, federal common law provided the sole means by which Illinois could seek the abatement and regulation of interstate pollution in federal court, the only forum available to it outside the original jurisdiction of this Court. *Milwaukee I*, 406 U.S. at 94-98, 104; *Milwaukee II*, 451 U.S. at 313-14. *See generally*, S. Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 Harv.Envtl.L.Rev. 41, 44-45 and n.36 (1983) (hereafter "Bleiweiss"). This Court admonished, however, that resort to federal common law was an extraordinary remedy, to be used only in a "few and restricted instances."[13] *Milwaukee II*, 451 U.S. at 313 (quoting *Com-*

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[12]"In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 314 n.7.

[13]It should be noted that *Milwaukee I* did not address the question of whether this newly recognized federal common law would be available to private parties, or only to sovereigns. Indeed, only the Third Circuit's opinion in *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3rd Cir. 1980), *vacated and remanded sub nom. Middlesex County Sewerage*

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mittee for Consideration of Jones Falls Sewage System v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976), and *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

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Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), clearly indicated that private parties could utilize such law. *Id.*, 616 F.2d at 1235. Although certiorari was granted in the *Middlesex County* case, before the case was decided this Court handed down its decision in *Milwaukee II*, holding federal common law preempted by the FWPCA. Thus, the question of whether private parties could raise questions of federal common law was moot. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, supra*, 453 U.S. at 11 n.17 ("We therefore need not discuss the question whether the federal common law of nuisance could ever be the basis of a suit for damages by a private party."). *See also id.* at 21. Thus, it is unclear whether federal common law was ever available to Respondents.

Disagreeing with the Third Circuit's decision, and holding instead that private litigants have no claim under federal common law, were the following: *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976) ("In controversies such as this one, there is present neither the reason nor the necessity for the invocation of a body of federal common law which was present in *Illinois v. Milwaukee.*"); *Township of Long Beach v. City of New York*, 445 F.Supp. 1203, 1213 (D.N.J. 1978) ("It is agreed that the decision in [*Milwaukee I*] should not be extended to encompass an action by a private person."); *Parsell v. Shell Oil Co.*, 421 F.Supp. 1275, 1281 (D.Conn. 1976), *aff'd. without opinion*, 573 F.2d 1289 (2d Cir. 1977) (federal cause of action for nuisance "has not been extended to suits brought by private plaintiffs"). *See generally* R. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U.Penn.L.Rev. 121, 158 n. 198 (1985) (hereafter "Glicksman"); R. Lutz, *Interstate Environmental Law: Federalism Bordering on Neglect?*, 15 Land Use & Env't L.Rev. 569, 606-07, and n.202 (1984) (hereafter "Lutz"); S. Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 Harv.Envtl.L.Rev. 41, 47-48 (1983) (hereafter "Bleiweiss"); C. Dexter and T. Schwarzenbart, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 Wis.L.Rev. 627, 637-38, 663 (hereafter "Dexter").

Thus, in *Milwaukee I*, this Court had neither reason nor occasion to discuss the continued existence of state common law remedies in cases where such remedies would otherwise be available—that is, in cases not between quasi-sovereigns seeking regulatory authority, but between private persons suing other private entities for injuries to themselves or to their property. The limited nature of the *Milwaukee I* holding was made even clearer in this Court's subsequent opinion in *Milwaukee II*. There, the Court held that the recently recognized federal common law of nuisance had been preempted by the intervening passage of the FWPCA, which provided precisely the sort of federal regulatory scheme for limiting interstate water pollution Illinois had sought in its earlier suit. *Id.*, 451 U.S. at 319-20. Illinois no longer had to resort to the "necessary expedient" of federal common law, since applicable federal statutory law was now available, thus insuring access to a federal court forum. *Id.*

Indeed, in *Milwaukee II* this Court implicitly acknowledged the continued vitality of state common law remedies in suits between private parties.[14] The Court reiterated that federal courts, unlike state courts, "do not possess a general power to develop and apply their own rules of decision." *Id.*, 451 U.S. at 312. Rather,

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[14]Since the only issue on which certiorari was granted in *Milwaukee II* was whether the FWPCA preempted federal common law, this Court did not address the issue of state common law remedies. This Court subsequently denied Illinois' petition for certiorari challenging the Seventh Circuit's refusal to consider petitioner's claims under state common law. *Illinois v. Milwaukee*, 599 F.2d 151 (7th Cir. 1979), *Illinois' petition for cert. denied*, 451 U.S. 982 (1981).

> [t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.

Id. at 312-13 (citations omitted). Federal common law is therefore far more easily preempted by the passage of a federal statute than is state law. *Id.* at 316.

This Court then made clear that its preemption analysis was not to be construed as affecting state common law:

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law. In considering the latter question "*'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'*"

Id. (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 219, 230 (1947)) (emphasis added). This admonition was repeated in a footnote:

> Since the States are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding preemption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* common law. *Simply because the opinion in Illinois v. Milwaukee used the term "preemption," usually employed in determining if federal law displaces state law, is not reason to assume the analysis used to decide the usual federal-state questions is appropriate here.*

Id. at 317 n.9 (emphasis partly in original, partly added). *See also id.* at 316-17, and 319 n.14.

Clearly, then, nothing in *Milwaukee I or Milwaukee II* limits in any way Respondents' historic right to rely on state law to redress the injuries alleged in this action. Although extenuating circumstances made the creation of a federal common law doctrine of nuisance appropriate for use in suits between quasi-sovereign entities, and while such suits may continue to require special treatment, these constraints simply do not exist where private parties seek redress against other private parties, under their own state law, for pollution-causing injuries. Therefore, the lower courts correctly denied Petitioner's motion to dismiss on this ground, and their rulings should be affirmed.

II. THE FWPCA DOES NOT PREEMPT STATE COMMON LAW REMEDIES FOR SUITS BETWEEN PRIVATE PARTIES.

The foregoing makes clear that, despite Petitioner's contrary arguments, decisions of this Court do not impair the longstanding rights of Respondents to seek redress for injuries caused by Petitioner's pollution of Lake Champlain, under Vermont common law. Petitioner's next argument, that the FWPCA itself preempts such rights, does not withstand scrutiny.

First, as this Court has repeatedly warned, it is presumed that federal statutory law does not preempt state common law unless Congress has clearly and manifestly indicated its intention to do so. This presumption applies with full force to the FWPCA. However, in passing the Act, Congress did not simply rely on this presumption; rather, it affirmatively stated, in clear and express language, its intent to preserve state common law remedies. Given such unambiguous statements of Congressional intent not to preempt, Petitioner faces a heavy burden in seeking to argue that Congress *implicitly* intended preemption. Indeed, in light of the prerequisites for "implied preemption" clearly established by this Court, it is a burden which Petitioner utterly fails to carry.

A. It Is To Be Presumed That The FWPCA Does Not Preempt Vermont Common Law.

As this Court has consistently recognized, there is a presumption that when Congress acts it does not preempt state law, unless there is a clear and unmistakeable Congressional intention to do so. This is especially true when legislation falls in those areas traditionally within the ambit of the state's police powers. As this Court stated recently in *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra:*

> Where . . . the field that Congress is said to have preempted has been traditionally occupied by the States we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

105 S.Ct. at 2376 (quoting *Jones v. Rath Packing Co., supra,* 430 U.S. at 525, and *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230).[15]

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[15] *See also Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248, 255 (1984) (preemption analysis starts with presumption

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Since the provision of state common law remedies to redress injuries caused by pollution-generating activities clearly falls within the exercise of a state's police power, *Huron Portland Cement Co. v. Detroit, supra,* 362 U.S. at 442, this Court has stated that any inquiry into whether the FWPCA preempts state common law must then begin with precisely the same assumption. *Milwaukee II,* 451 U.S. at 316. Thus, absent a clear and unmistakable manifestation of Congressional intent to preempt state common law remedies through the passage of the FWPCA, the continuing vitality of Vermont common law is presumed.[16]

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that Congress did not intend to displace state law, and dictates no preemption of state punitive damages remedies by federal regulation of nuclear facilities, absent express Congressional intention to do so); *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 343 (1973) ("It follows, a *fortiori,* that sea-to-shore pollution—historically within the reach of the police power of the States—is not silently taken away from the States by the Admiraity Extension Act, which does not purport to supply the exclusive remedy."); *Ferebee v. Chevron Chemical Co., supra,* 736 F.2d at 1542 (Federal Insecticide, Fungicide, and Rodenticide Act did not preempt state tort suits based on inadequacy of an EPA-approved label); *Chevron U.S.A., Inc. v. Hammond, supra,* 726 F.2d at 488 (Ports and Waterways Safety Act did not preempt police power of Alaska to pass regulations regarding pollution discharges into State's boundary waters).

[16]*See generally Stoddard v. Western Carolina Sewer Auth., supra,* 784 F.2d at 1207 (FWPCA does not preempt common law nuisance action by private citizens, absent "a clear and manifest congressional purpose" to do so); *Bass River Assocs v. Mayor of Bass River Township, supra,* 743 F.2d at 162 (local zoning

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B. The FWPCA Expressly Preserves State Common Law Remedies For Suits Between Private Parties.

Congress, in passing the FWPCA, did not simply rely on the presumption that the Act would not displace state law. Instead, it clearly and affirmatively expressed its intent to preserve state common law remedies to redress private injuries from water pollution. Section 505(e) of the Act, the so-called "savings clause," expressly provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation *or to seek any other relief* (including relief against the Administrator or a State agency).

33 U.S.C. § 1365(e) (emphasis added). Nothing could be a clearer indication of legislative intent to preserve state common law rights.

Indeed, several courts which have considered the question have declared that Congress, in passing the Act, clearly intended to preserve all state common law remedies. *Stoddard v. Western Carolina Sewer Authority, supra,* 784 F.2d at 1207 ("We cannot imagine a clearer Legislative expression retaining the right to [state law] remedies [than that

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regulations regarding houseboats not preempted by federal legislation for ship licensing or FWPCA); Glicksman, *supra,* 134 U.Penn.L.Rev. at 183 ("Absent a clear manifestation of congressional intent to preempt state common-law remedies, the presumption of continuing state authority cannot be rebutted."); A. Cohen, *Statutory Preemption of Federal Common Law: Milwaukee v. Illinois,* 24 J.Urb&Contempt.L. 245, 256-58 (1983); Dexter, *supra,* 1982 Wis.L.Rev. at 655-56, 663-64, and n.276.

expressed in 33 U.S.C. § 1365(e)]."); *Committee for Consideration of Jones Falls Sewage System v. Train, supra,* 539 F.2d at 1009 n.9 (Congress "recognized the continuing vitality of state common law nuisance actions" in subsection 1365(e) of the FWPCA) (cited in *Milwaukee II,* 451 U.S. at 329); *City of Philadelphia v. Stepan Chemical Co.,* 544 F.Supp. 1135, 1154 (E D.Pa. 1982) (finding no preemption under FWPCA and allowing action for damages relating to water pollution on state common law nuisance, trespass, strict liability and negligence grounds). *Cf. Middlesex County Sewerage Auth. v. Sea Clammers, supra,* 453 U.S. at 20 n.31 ("The legislative history [of the FWPCA savings clause] makes clear Congress' intent to allow further enforcement of antipollution standards arising under *other* statutes *or state common law.")* (emphasis added).

Such preservation is wholly consonant with the legislative history of the FWPCA, which provides even more persuasive evidence that Congress intended the savings clause to preserve rights already enjoyed by citizens. The Senate Report accompanying 33 U.S.C. § 1365(e) states:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. *Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.*

S.Rep. No. 92-414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 *U.S. Code Cong. & Ad. News* 3668, 3746-47 (emphasis added) (A 12-13). A review of the 1971 Senate markup hearings on the FWPCA confirms Congressional intent to preserve all private, common law remedies:

> "The provision, subsection e, provides merely that . . . this section [§ 1365(e)], the authorization granted in this section, in no way affects any rights a person has, whether or not acting alone or as a class, under any other law, statutory or common, for relief against a pollutor (sic). This would normally mean that if there are some damages, standard common law damages, and a person would like to join with a class of people that suffered similar damage, this does not prevent them from doing so."

Transcripts, Senate Committee on Public Works' markup of FWPCA, Roll 17 at 1617-18 (9/21/71) (JA 189). *See also* Remarks of Senator Stafford, Cong.Rec. S11305-07 (daily ed. Sept. 12, 1985) (JA 184-91).[17]

Moreover, the preservation of common law remedies is consistent with the Act's underlying purpose, which is to "eliminate the discharge of pollutants into navigable waters by 1985." *Ouellette,* 602 F.Supp. at 268 (*citing* 33 U.S.C. § 1251(a)(1)) (A 11). To this end, and despite "extensive federal oversight," the "express policy" of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." *Id.* (*quoting* 33 U.S.C. § 1251(b)). Thus, subsection 1370(2) expressly instructs that the Act shall not "be construed as impairing or in any manner affecting any right or jurisdiction of the States

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[17]Recent Senate debate on a proposed amendment to the savings clause confirms that body's assumption that private citizens have always retained their right to sue polluters, under state common law, for the injuries caused by such pollution. *See* S. 1128, 99th Cong., 1st Sess., 131 Cong. Rec. S8126-40 (daily ed. June 13, 1985). That amendment would add a new subsection (e)(3) to the citizen suit provision, extending to states the same rights enjoyed by private citizens to "seek any other relief" in federal courts exercising diversity jurisdiction and enforcing state common law. Glicksman, *supra,* 134 U.Penn.L.Rev. at 209 n.463.

with respect to the waters (*including boundary waters*) of such states." *Id.* (emphasis added).

Finally, the regulations promulgated by the EPA to administer the NPDES permit process also presume that common law remedies for pollution-caused injuries survive the regulatory scheme:

> The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.

40 C.F.R. § 122.5(c) (rev'd 7/1/85) (App. 4). *See Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2377 (given detailed manner in which federal agencies normally address regulated activity, "we can expect that they will make their intentions clear if they intend for their regulations to be exclusive").

It is therefore amply clear that Congress did not expressly preempt state common law remedies for those injured by interstate water pollution. To the contrary, the manifest and oft-expressed legislative intent was precisely to preserve all such state remedies. *Cf., Wardair Canada, Inc. v. Florida Dept. of Revenue,* 54 U.S.L.W. 4687, 4688-89 (U.S. June 17, 1986), *aff'g.* 455 So.2d 326 (Fla. 1984) (where Federal Aviation Act expressly permits state's imposition of sales tax on airline fuel, no preemption of state law). As Chief Judge Coffrin concluded in his opinion below:

> Consideration of the express language of the saving clause and state authority provision of the Act, the legislative history, and the stated objectives of the Act inevitably leads one to the conclusion that Con-

> gress intended to authorize resort to state nuisance law in situations such as the instant one.

Ouellette, 602 F. Supp. at 272 (A 19-20).

C. Nothing In The FWPCA Impliedly Preempts State Common Law Remedies.

Given the presumption against federal preemption of state common law, the absence of express preemptive language in the FWPCA, and, indeed, the presence of language expressly preserving state common law remedies, Petitioner faces an "uphill battle" in arguing that such remedies were impliedly preempted by the Act. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2375. Given the prerequisites set forth by this Court for implied preemption, it is a battle which Petitioner utterly fails to win.

This Court recently reiterated the two-part test for establishing that state common law has been impliedly preempted by a federal statute. In order to satisfy the Supremacy Clause, the proponent of implied preemption must establish either that Congress has totally occupied the field of a given legislation, or that the federal act impossibly conflicts with state law:

> [First, in] the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

> [Second, even] where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 2375 (citations omitted). In *Hillsborough* this Court went on to stress the significant burden borne by the party arguing implied preemption, in terms which are equally applicable here:

> Appellee must thus present a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.

Id. at 2376. Here, as in *Hillsborough,* that burden is insurmountable.

1. The FWPCA is Neither So Comprehensive, Nor the Federal Interest so Dominant, as to Impliedly Preempt State Law.

Petitioner cannot successfully argue that the FWPCA is so comprehensive as to "leave no room" for supplementary state law remedies, or that the federal interest in redressing private pollution-cause injuries is so dominant as to preempt such relief. As this Court pointed out in *Milwaukee II,* the comprehensiveness of a federal scheme is far less important when analyzing whether state, rather than federal, common law has been preempted:

> Since federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law, the comprehensive character of a federal statute is quite relevant to the present question, while it would not be were the question whether state law, which of course does not depend on the absence of an applicable Act of Congress, still applied.

Id. at 319 n.14 (citations omitted). *See also Silkwood v. Kerr-McGee Corp., supra,* 464 U.S. at 256.

In *Hillsborough,* the petitioner unsuccessfully attempted to rebut the strong presumption against preemption by arguing the "comprehensiveness" of the federal scheme.[18] *Id.* at 2377. This Court rejected that argument by noting that the "subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses by Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *Id.* (quoting *New York Department of Social Services v. Dublino,* 413 U.S. 405, 415 (1973)). Thus, "merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field." *Id.* The Court went on:

> To infer pre-emption whenever any agency deals with a problem comprehensively is virtually tanta-

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[18] Although in *Hillsborough* the Court was limited to the question of whether the federal *regulatory* scheme preempted state and local *regulation,* this Court pointed out that the same analysis would apply to the instant issue—whether federal *statutes* preempt state *common* law. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2375.

> mount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Id. at 2377 (citing *Jones v. Rath Packing Co., supra,* 430 U.S. at 525).[19]

In the instant case, the FWPCA is not so comprehensive as to imply preemption of state common law remedies.[20] The statute simply sets forth a regulatory mechanism for limiting certain pollution discharges into interstate waters, and for monitoring compliance with those limitations. Nowhere in the FWPCA is provision made for remedying inevitable pollution-caused private injuries. *Ouellette,* 602 F.Supp. at 269 (citing *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, supra,* 453 U.S. at 13-18) (A 12). *See also Silkwood v. Kerr-McGee Corp., supra,* 464 U.S. at 251 (Given Congress' failure to provide any federal remedy for persons injured by radiation injuries, it "is difficult to believe that Con-

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[19]This Court also reasoned that since Congress and federal agencies "normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend" for their statutes and regulations to be "exclusive." *Id.* at 2377. For that reason, this Court "will seldom infer, solely from the comprehensiveness of federal [statutes or] regulations, an intent to preempt in its entirety a field related to health and safety." *Id.*

[20]Notwithstanding statements by this Court characterizing the FWPCA as "an all encompassing program of water pollution regulation," whose major purpose was to "establish a *comprehensive* long range policy for the elimination of water pollution," *Milwaukee II,* 451 U.S. at 318 (emphasis in original), its "gaps and shortcomings" in the interstate context, especially where private interests are injured, have been noted repeatedly. *See e.g.,* Glicksman, *supra,* 134 U.Penn.L.Rev. at 198-200, and nn. 411-415.

gress would, without comment, remove all means of judicial recourse."). Thus, in the absence of state common law remedies, a person injured by interstate water pollution would be unable to recover against the polluter. As Chief Judge Coffrin noted, it is inconceivable that such a result, clearly antithetical to the ends of the Act, was intended by Congress. *Ouellette,* 602 F.Supp. at 269 (A 12).

Nor can Petitioner successfully argue that the federal interest in the matter predominates, inasmuch as remedying injuries to citizens caused by the pollution-generating actions of others falls squarely within the police powers of the states. *Milwaukee II,* 451 U.S. at 316 (*quoting Jones v. Rath Packing Co., supra,* 430 U.S. at 525, and *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230).[21] In *Hillsborough,* this Court similarly refused to infer preemption from the alleged dominance of the federal interest in the matter of blood plasma donorship. "Rather, as we have stated, the regulation of health and safety is primarily, and historically, a matter of local concern." *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2378.

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[21]Recently, the Fourth Circuit Court of Appeals followed this analysis and held that the FWPCA did not preempt state law remedies. *See Stoddard v. Western Carolina Regional Sewer Authority, supra,* 784 F.2d at 1207, in which riparian landowners sued a municipal sewer authority for intrastate water pollution, seeking enforcement of the FWPCA and asserting state common law nuisance and taking claims, as well. The Circuit Court stated:

> Before the Supreme Court finds that state law has been preempted . . . a clear and manifest congressional purpose must be found, and the Court's analysis includes due regard for the concepts of federalism. We see nothing in the Clean Water Act that presages a congressional intent to

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Thus, Petitioner cannot meet the first prong of the test for implied preemption of Vermont common law remedies: the FWPCA is not so comprehensive, nor the federal interest so dominant, as to occupy the field. Congress has indeed left room for supplementary state relief, since state common law provides the only remedy to private parties injured by interstate water pollution. Moreover, given the historic interest of the states in providing precisely the relief withheld in the Act, it cannot be said that the federal interest in the matter so predominates as to imply preemption of state law.

2. State Law Remedies Do Not Conflict With The Act Such As To Imply Preemption.

Equally meritless is the argument that the FWPCA so conflicts with the provision of state common law remedies as to imply their preemption. In *Silkwood v. Kerr-McGee Corp., supra,* this Court pointed out that, in order to imply preemption of state law on this ground, the inquiry turns on "whether there is an *irreconcilable* conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Id.* at 256 (emphasis added).

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> occupy the entire field of water pollution to the exclusion of State regulation.

Id. (citations omitted), *Accord, Bass River Assocs v. Mayor of Bass River, supra,* 743 F.2d at 165-66 (Section 1370 "[c]learly shows Congress' intent *not* to preempt state antipollution efforts. . . . Thus we find . . . no merit in the . . . contention that 'Congress has left no room for state supplementation.'") (holding FWPCA does not preempt local ordinance prohibiting "floating homes").

In *Silkwood,* this Court found "no such conflict or frustration" between the Federal Atomic Energy Act and the provision of state common law remedies. *Id.* Pointing out that the possibility of "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible," *id.* at 257, this Court also made clear that exposure to punitive damages does not "frustrate any purpose of the federal remedial scheme." *Id.*

Indeed, since the federal goals of uniformity and promotion of nuclear power may not be accomplished at the cost of public health and safety, this Court concluded that subjecting regulated industries to state common law liability for the injuries they cause in fact *promotes* the federal goals. *Id. See also Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2378-80 (Different and stricter state and local requirements neither conflict with federal scheme nor "imperil" the federal goal of insuring an "adequate supply of plasma."). The same analysis, applied to the instant case, yields only one conclusion: permitting private parties injured by interstate water pollution to seek redress under state common law will neither conflict with the federal scheme nor frustrate the objectives of the FWPCA.

Clearly, it is not "physically impossible" for Petitioner —or any other entity operating pursuant to an NPDES permit—to comply with both the federal scheme and any civil judgment rendered against it. *Id.* at 257. As one commentator has noted:

> The application of state B's common-law remedies to a state A polluter would not actually conflict with federal law in the sense that it would be physically impossible to comply with both sets of standards. By com-

> plying with the most stringent requirement—either federal or state—company A also complies with the more lenient controls. . . . If state B's courts assess damages against company A, even though the company is in full compliance with federal standards, the company can comply with both federal and state B's laws by limiting discharges in accordance with the federal standards and compensating, in accordance with the state B court decree, those injured by the discharges.

Glicksman, *supra,* 134 U.Penn. L.Rev. at 198 and n.407.

Nor does the provision of state common law relief stand as an "obstacle to the accomplishment and execution of the full purposes of objectives of Congress." *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2375. First, nothing in the Act implies that Congress intended an NPDES permit to limit the legal obligations imposed upon a discharger. Indeed, as Chief Judge Coffrin noted:

> [T]here is no indication that Congress ever intended that the NPDES permit confer an absolute right to discharge to the extent allowed by the permit. Since compliance with the Act does not constitute a defense to a common law action for damages, Congress must have recognized that some uncertainty would result to discharges of pollutants. The goal of the FWPCA is not finality; rather, it is the elimination of the discharge of pollutants.

Ouellette, 602 F.Supp. at 271 (A 17-18) (citations omitted). *See also* 40 C.F.R. § 122.5(c) (App. 4).

Moreover, this federal goal is actually promoted by allowing such private nuisance actions to proceed. As Chief Judge Coffrin observed:

> [N]othing in the application of traditional common law remedies for nuisance would, as a practical matter, interfere with the objectives of the Act. In fact, the opposite is true. Congress, in passing the Act sought "to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into navigable waters. S.Rep. 92-414, 92nd Cong., 2d Sess. 81, *reprinted in U.S. Code Cong. & Ad.News* 3668, 3678. To this end, states' imposition of compensatory damage awards and other equitable relief for injuries caused by discharges into interstate waters merely *supplement* the standards and limitations imposed by the Act.

Ouellette, 602 F.Supp. at 271 (A 17) (emphasis in original). Thus, the continued availability of traditional state common law remedies would not conflict with the FWPCA, and preemption on this basis cannot properly be implied.

In short, Congress neither expressly nor impliedly preempted state common law remedies to redress injuries caused to private citizens by another's pollution-generating activities. Indeed, the language preserving such remedies is clearly set forth in the statute itself, and in its legislative history. Moreover, the FWPCA is not so comprehensive as to imply preemption, nor can preemption be implied from any arguable dominance of federal interest in the matter, given the historic right of citizens to seek redress, in their own courts, for injuries caused by the pollution-related activities of others. Finally, since compliance with both state and federal law is not only possible, but furthers the goals of the Act, preemption cannot be implied from supposed conflicts with the federal scheme.

III. VERMONT LAW APPLIES TO THE ENTIRE CONTROVERSY.

It is clear that federal law has not preempted state common law remedies for injuries caused by pollution in interstate waters. The United States agrees with this posi-

tion, insofar as Respondents seek compensatory damages for injuries to their persons and properties. U.S.Br. 22-26. However, the United States goes on to argue that the FWPCA preempts Respondents' common law claims for injunctive relief and punitive damages, in that these claims must be adjudicated under New York law, the state from which Petitioner's pollution eminates. U.S.Br. 17-22, 26-28. This argument, which selects out portions of the common law for the purposes of preemption analysis, was soundly rejected by this Court in *Silkwood v. Kerr-McGee Corp., supra,* and is equally unavailing here.

In *Silkwood,* this Court began by employing its traditional preemption analysis to determine that the Atomic Energy Act did not preempt state tort law remedies, both because Congress intended their preservation, *id.,* 464 U.S. at 251-54, and because allowing resort to state law would not conflict with the federal scheme. *Id.* at 257. This Court then rejected Kerr-McGee's further argument that, given the differences between compensatory and punitive damage awards, at most Congress preserved only the former:

> This argument, however, is misdirected because our inquiry is not whether Congress expressly allowed punitive damages awards. Punitive damages have long been a part of traditional state tort law. As we noted above, Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted. Thus, it is Kerr-McGee's burden to show that Congress intended to preclude such awards. Yet, the company is unable to point to anything in the legislative history or in the regulations that indicates that punitive damages were not to be allowed.

Id. at 255 (citations omitted).

The Court also rejected the arguments of the United States, as *amicus curiae,* that the award of punitive damages was preempted because it conflicted with the permit/penalties provisions of the Act:

> [T]he award of punitive damages in the present case does not conflict with that scheme [of imposing civil penalties on licensees who violate federal standards]. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme. . . . We also reject Kerr-McGee's submission that the punitive damages award . . . conflicts with Congress' express intent to preclude dual regulation of radiation hazards.

Id. at 257 (citations omitted). Similarly, here there is simply no evidence of legislative intent to preempt or limit any aspect of state common law relief.

As has already been demonstrated, the "entire discussion" surrounding the 1972 Amendments was "premised on the assumption" that state common law remedies would continue to be available, notwithstanding the regulatory scheme. *Id.* at 254. Thus, here, as in *Silkwood,* Respondents' right to seek relief under Vermont law cannot be withdrawn in the piecemeal fashion urged by the United States. Compensatory damages compensate for injuries; punitive damages and injunctive relief, "long . . . traditional part[s] of state tort law," *Silkwood v. Kerr-McGee Corp., supra,* 464 U.S. at 255, require no different analysis. Such remedies are "designed primarily to redress a plaintiff's particular injury. . . . A state's nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare, and property rights of its own residents." *Ouellette,* 602 F.Supp. at 271-72 (A 19).

Thus, if state common law is preserved, and it clearly is under the preemption analysis dictated by this Court,

then normal choice-of-law doctrines mandate the application of Vermont law to the entire controversy.[22]

IV. RESPONDENTS ARE NOT PREEMPTED FROM LITIGATING THIS COMMON LAW ACTION IN VERMONT COURTS (INCLUDING A FEDERAL DISTRICT COURT) UNDER VERMONT LAW.

It is also clear that Respondents may litigate this action in the courts of Vermont, including a federal district court sitting in Vermont. Petitioner, however, argues that only the courts of New York may hear the matter, applying New York law (A 7). Petitioner in effect is asking this Court to develop a wholly new common law rule of subject matter jurisdiction. Petitioner urges that no courts, except the courts of the state where industrial pollution originates, have jurisdiction to hear pollution damage actions. This position is simply without merit.

Petitioner first attempts to argue that the FWPCA itself dictates such a rule. However, as the United States points out, U.S.Br. 16, this argument, which erroneously "equates legislative jurisdiction with judicial jurisdiction" by relying upon the citizen suit provision of the Act, is inapposite to the private action brought here. *Id.* Secondly,

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[22]Indeed, even under the arguments of the United States, Vermont law would apply here. U.S.Br. 20 and n.27 (arguing that Vermont law would apply if New York law so dictates) (citing previous arguments by Petitioner that New York law calls for the application of Vermont law, U.S.Br. 7-8, and n.7, and *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 376 N.E. 2d 914, 915 (1978) ("*Lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances.")). *See also* Argument, *supra*, at 12.

Petitioner seeks to rely on *dicta* in *Milwaukee III*. Pet. 20.[23] However, as has already been noted, there the Seventh Circuit was constrained by the sovereign nature of the parties, since each state was precluded from utilizing its own state law to enforce rights against the other state. Respondents have already established that such constraints do not exist in this action between private parties. *See* Argument I, *supra*.

The only other basis offered by Petitioner to disqualify a federal court sitting in Vermont is the one stated in its petition: bias and local prejudice on the part of such federal courts. Pet. 6. These allegations, which insult and misapprehend the role of the federal judiciary, hardly merit full attention in this brief. Clearly, whichever state law is to be applied in this matter, courts in Vermont are qualified to apply it. Indeed, as the United States has indicated, the threat of possible bias would exist to the same extent in New York courts, U.S.Br. 17 n.21, and is precisely why federal diversity jurisdiction historically exists in a case such as this. *See* 3 J.Elliot, *Debates on the Federal Constitution* 533 (1836) (remarks of James Madison). Thus, this argument, which the United States aptly characterizes as "wholly insubstantial," U.S.Br. 16, must be rejected.

All of the sound reasons which compel the conclusion that Respondents' common law remedies have not been preempted also compel the determination that this action may proceed in Vermont federal court, applying Vermont

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[23]"Pet." citations are to the Petition for Certiorari, filed with this Court on January 22, 1986.

law. As such, this Court should affirm the decisions of the courts below.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: Middlebury, Vermont
July 14, 1986

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

TEXT OF STATUTES RELIED ON FEDERAL WATER POLLUTION CONTROL ACT

33 U.S.C. § 1251

§ 1251. *Congressional Declaration of Goals and Policy*

(a) *Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective*

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) *Congressional recognition, preservation, and protection of primary responsibilities and rights of States*

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including resoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) *Congressional policy toward Presidential activities with foreign countries*

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) *Administrator of Environmental Protection Agency to administer chapter*

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) *Public participation in development, revision, and enforcement of any regulation, etc.*

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) *Procedures utilized for implementing chapter*

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) *Authority of States over water*

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that

nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

TEXT OF REGULATIONS RELIED ON
PART 122 — EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

40 C.F.R. § 122.5

§ 122.5. *Effect of a Permit*

(a) *Applicable to State programs, see § 123.25.* Except for any toxic effluent standards and prohibitions imposed under section 307 of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement, with sections 301, 302, 306, 307, 318, 403, and 405 of CWA. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in §§ 122.62 and 122.64.

(b) *Applicable to State programs, see § 123.25.* The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

(c) The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.

REPLY

BRIEF

No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1233

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR. and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner International Paper Company ("IPCo") respectfully submits this reply brief in response to the answering brief of the respondent riparian land owners and to the briefs *amicus curiae* filed on behalf of the United States by the Solicitor General and on behalf of thirteen individual states by the Attorney General of Tennessee.

Summary of Argument

The core issue which this case presents is whether, and if so, to what extent, non-source states may apply their laws to discharges into interstate waters from another state and the jurisdiction of the courts of non-source states to entertain suits respecting such discharges in view of the Federal Water Pollution Control Act of 1972 ("FWPCA"), 33 U.S.C. §§ 1251 *et seq.* (1972) (A28-49).*

The Respondents and the states *amici* find in the FWPCA no impairment of what they see as an exercise of traditional power of non-source states to give relief against a nuisance, regardless of its source.** Indeed, Respondents (and the Second Circuit) discern an intent of Congress to revive non-source state competence over such discharges and to overturn the holding of *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972) (*"Milwaukee I"*) that such jurisdiction is preempted. The Petitioner and the United States, on the other hand, find in the FWPCA a comprehensive exertion of federal regulatory jurisdiction over discharges into navigable waters which, under familiar preemption principles, imposes limitations upon the power of states to act with respect to that subject.

The disagreement between Petitioner and the United States, and it is a profound and wide one, is over the extent

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* "A" citations are to the Appendix to the Petition for a Writ of Certiorari.

** Respondents misleadingly refer to health and safety considerations in describing this law suit and identifying the purported state interests which they contend support Vermont's jurisdiction over Petitioner's activities. The water class certified by the Vermont District Court never asserted any health or safety claims but claimed only that IPCO's discharges constituted a nuisance that interfered with the enjoyment of their property. *Ouellette* v. *International Paper Company,* 86 F.R.D. 476, 478 (D. Vt. 1980).

to which non-source state power has been curtailed. Petitioner argues, with the Seventh Circuit, that Congress' decision, in enacting the FWPCA, to foster a partnership of federal and source state regulation of discharges, by necessary implication, precludes the exercise of non-source state power to regulate such discharges, by any means, including damage actions.* Petitioner argues further that in order to avoid conflicts in application and the threat of multiple regulation of a single source, it is necessary to infer as well a congressional intent to confine proceedings to exercise the source state's jurisdiction to courts sitting in the source state.

The United States, arguing that the FWPCA preempts only "regulatory" actions based on a non-source state's law, finds no preemption of non-source state jurisdiction to grant "compensatory" damages (but not punitive damages or injunctions) and supports the jurisdiction of federal and state courts sitting in non-source states to entertain actions under non-source state law as well as source state law, guided only by traditional choice of law principles. Indeed, it argues that if the source state, applying its choice-of-law principles, would apply the law of a non-source state, then the non-source state court may accord any regulatory as well as compensatory remedies that the non-source state's law would provide.

We deal structurally with the argument of the Respondents and comment on the related contentions of the *amici* interstitially.

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* The United States observes (Brief of United States as *Amicus Curiae,* pp. 7-9) that IPCo has in the past made statements not consistent with the position it urges in this case. To the extent that any general statements of Petitioner's then counsel, made outside the context of the issues now presented and in situations where these issues would not have been thoroughly explored by counsel, support this suggestion, they are disavowed.

ARGUMENT

I.

The FWPCA Is a Comprehensive Regulatory Scheme Intended to Exercise Federal Regulatory Jurisdiction Over Discharges Into Navigable Waters, Supplemented Only by More Stringent Source State Regulations.

Clearly, preemption analysis under the Supremacy Clause must begin with the system of regulation of liquid discharges into navigable waters which Congress intended when it enacted the FWPCA. Congress has ample power to oust completely any state authority, whether based on statute or common law, whether "regulatory" or purely compensatory. *See, e.g., Campbell* v. *Hussey*, 368 U.S. 297 (1961); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956). While this Court has developed a number of principles of analysis which it employs for guidance in discerning the preemptive effect of a federal statute, it is the Act of Congress and the regulatory scheme the Act establishes which is supreme, and state authority in an area that has been federally regulated exists, if at all, only to the extent that the federal statutory scheme admits of its exercise.

The FWPCA is somewhat unusual in that it not only expressly establishes a scheme of federal regulation acting through federal instrumentalities, but also contemplates a system of federally-fostered source state regulation of discharges into navigable waters that is brigaded with, and can displace, federal regulation of point sources located within a source state and its boundary waters. This system of dual authority is limited to federal and source state regulation; non-source states are expressly assigned a consultative, rather than a regulatory role. So far as here relevant, the principle themes that characterize the statutory

scheme are: *first*, that any given source shall be subjected to a *single* regulatory regime, the source state's scheme if it meets federal requirements, the federal scheme if the source state does not; and *second*, that the jurisdiction of each source state is carefully qualified by subjecting its regulations to federal standards and a federal umpire, the Environmental Protection Agency Administrator.

The paradigm of preemption analysis is, of course, a federal statute which is claimed to supersede an inconsistent state power, whether statutory or common law, and the vast bulk of this Court's preemption decisions deal with this set of facts. Congress' exercise of its law-making power, however, offers a number of different reconciliations of federal and state power. For example, the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e *et seq.* establish a federal regulatory scheme, but authorize and foster more stringent state statutory regulations; the McCarren-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, while broadly supportive of federal regulatory authority over the business of insurance, allows the states, by enacting consistent or inconsistent statutes, to supersede federal regulation in certain areas, notably trade regulation. This Court in *Silkwood* v. *Kerr-McGee*, 464 U.S. 238 (1983), found itself faced with two federal statutory policies, one which accorded exclusive regulatory control of nuclear plant safety to a federal agency and a second which preserved the competency of the states to provide tort remedies by way of compensation. In each case where this Court has been called upon to consider the effect of any of these federal statutes on state law, *see, e.g., Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942) (construing FLSA); *F.T.C.* v. *National Cas. Co.*, 357 U.S. 560 (1958) (construing McCarren-Ferguson Act); *New*

York Gaslight Club, Inc. v. *Carey*, 447 U.S. 54 (1980) (construing Civil Rights Act), this Court saw its role as one of protecting the paramountcy of the entire federal statutory scheme, although the effect of that principle on the scope of state power varies considerably.

The scheme of the FWPCA, we submit, offers still another departure from the preemption paradigm—one in which there is a comprehensive scheme of regulation, an express deference, not to state power generally, but to source state regulation, and a clear intent not to have multiple regulation of a single source. § 402(c), 33 U.S.C. § 1342(c) (A45-46); *see EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 206 (1976).

The analysis of the FWPCA's effect on state regulation of interstate water disputes adopted by the Respondents reveals a fundamental misconception of the FWPCA scheme. The Respondents chose to look at the specific components of this plan in isolation, ignoring the overall regulatory mechanism and ignoring the fact that Congress defined specific and differentiated roles for source states and non-source states. They argue, first, that there never was any preemption of state law jurisdiction over disputes over the use of interstate waters between private parties; that assuming *arguendo* that *Milwaukee I* holds that private, as well as quasi-sovereign actions were preempted, the FWPCA expressly supports the power of non-source states to entertain traditional actions to abate or compensate for a nuisance; and finally, that assuming *arguendo* that there was no express revival of such state competency, under traditional principles of preemption analysis, the FWPCA should not be construed as superseding non-source state jurisdiction. We deal with each of these arguments *seriatim*.

A. The Decisions of this Court in *Milwaukee I* and *Milwaukee II* were not limited to Disputes Between Quasi-Sovereign Entities.

As the Vermont District Court correctly concluded, after *Milwaukee I* and *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), "state law . . . cannot control interstate water pollution controversies" absent Congressional authorization. *Ouellette* v. *International Paper Company*, 602 F. Supp. 264, 268 (D. Vt. 1985) (A17). Respondents attempt before this Court to argue that these decisions should be read in such a manner as to limit their effect to disputes between quasi-sovereigns seeking to regulate each other's water-polluting activities rather than to all disputes involving interstate waters. They read this Court's preemption analysis in *Milwaukee I* as nothing more than a necessary expedient to provide Illinois with a forum in which to bring a nuisance suit directed at the City of Milwaukee and other instrumentalities of Wisconsin. Brief of Respondents, pp. 15-16.*

Despite Respondents' claims, this Court's prior decisions make clear that federal law does not come into play only in interstate pollution disputes involving quasi-sovereign entities. Federal law governs interstate water disputes regardless of the nature of the parties; as this Court observed in *Milwaukee I*, "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6.** There is nothing in either *Milwaukee I* or *Milwau-*

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* Respondents' argument on this score misrepresents both *Milwaukee I and Milwaukee II*. The holding of *Milwaukee I* is well illustrated by Justice Douglas' discussion of the body of federal common law which this Court expected would develop from that decision. 406 U.S. at 107-108.

** Notwithstanding Respondents' arguments, courts have generally recognized the right of private parties to sue under federal common

(footnote continued on following page)

kee II to suggest that federal law is only applicable to the regulation of the use of interstate waters where the litigants are sovereign entities rather than private parties.

Moreover, such a conclusion cannot be reconciled with the reasoning behind these decisions. To contend that *Milwaukee I* merely reflects an attempt to resolve a situation requiring "special treatment" and involving "extenuating circumstances" is to ignore completely the focus of that case on the peculiarly interstate nature of the controversy rather than on any particular aspect of the parties.* As the

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law. *See National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222 (3rd Cir. 1980), *vacated and remanded on other grounds sub nom. Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Byram River* v. *Village of Port Chester, New York*, 394 F. Supp. 618 (S.D.N.Y. 1975); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The cases cited by Respondents (Brief of Respondents, p. 17) in support of their contention that the invocation of federal law is appropriate only where quasi-sovereign entities are involved further demonstrate their failure fully to consider the reasoning behind this Court's decision in *Milwaukee I*. Except for dicta in one case, *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1213 (D.N.J. 1978), the denial of standing to private parties in the cases cited by Respondents was predicated primarily on the absence of any interstate effects of the pollution at issue. *See, e.g., Committee for Consideration of Jones Falls Sewerage System* v. *Train*, 539 F.2d 1006 (4th Cir. 1976); *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), *aff'd without opinion*, 573 F.2d 1289 (2d Cir. 1977). These cases recognize that when the effects of water pollution are confined within the borders of the source state, the potential for interstate conflict and, hence, the need for the application of federal law, no longer exists. Where, as here, suits between private parties plainly implicate interstate concerns, the reasoning behind *Milwaukee I* is clearly applicable.

* Petitioner does not contest Respondents' assertion that courts in one state may adjudicate tort claims for injuries occurring in that state based on events occurring elsewhere. The exercise of such jurisdiction, however, is plainly limited to those situations in which

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United States observed in its *amicus* brief in *Illinois* v. *Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *as amended*, Nos. 77-2246 & 81-2236 (May 29, 1984), *cert. denied sub nom., Scott* v. *City of Hammond*, 105 S. Ct. 979 (1985) ("*Milwaukee III*"),

> "This case is not an ordinary tort suit; it involves the question of pollution of interstate waters which this court repeatedly has held to require special treatment. There is not presented a choice-of-law question in the sense considered in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Rather, it is clear that federal law governs (see *Milwaukee I*, 406 U.S. at 105 and n.7; *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)), and state law is preempted to the extent required by federal law." Brief for the United States at 13 n.12.

Milwaukee I plainly held that federal law applies in *all* interstate water disputes, and preempted state law-based regulation of discharges into interstate waters. Thus, prior to the passage of the FWPCA, state law was completely unavailable in interstate pollution disputes; following the enactment of the FWPCA, the use of state law was limited to those state remedies authorized, expressly or implicitly, by the FWPCA.*

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such a court has *both* subject matter and personal jurisdiction. In this instance, while a Vermont court may have *in personam* jurisdiction over IPCo, the unique nature of the underlying dispute curtails its jurisdiction over the subject matter of this action.

* While *Milwaukee II* distinguishes between the criteria used to determine whether a federal statute preempts state law and the less rigorous tests used to determine whether it supersedes federal common law, there is no suggestion in *Milwaukee II* that it intended to

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B. The FWPCA Did Not Confer on a Non-Source State the Power to Regulate Interstate Pollution Emanating From Another State.

Respondents' reliance on language in the FWPCA, in particular the "savings clause", § 505(c), 33 U.S.C. § 1365 (c) (A52), and similar references to preserving state law remedies in the legislative history, to support their contention that the FWPCA expressly preserves state common law remedies for suits between private parties, is plainly flawed. Instead, a fair reading of § 505(c) in the context of this Court's precedents requires the conclusion that Congress intended by the savings clause to ensure that § 505 was not read to extinguish any *existing* rights of the states, such as the right of a state to regulate dischargers within its own borders.

Nothing in the Act, the regulations or the legislative history does anything more than suggest that Congress intended "to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters." *Milwaukee III*, 731 F.2d at 413. Certainly, there is nothing to support the respondents' claim that "the manifest and oft-expressed legislative intent" was precisely to preserve all state common law remedies for those injured by interstate water pollution, Brief of Respondents, p. 26,

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overrule the holding of *Milwaukee I* that federal law preempted state law regulation of discharges into interstate waters. The holding of *Milwaukee II* is that the comprehensive scheme of the 1972 FWPCA superseded federal common law. The *Milwaukee II* Court denied Illinois' petition for certiorari, which sought to review the Seventh Circuit's holding that state common law was preempted. *See Illinois* v. *Milwaukee*, 451 U.S. 982 (1981). Since *Milwaukee I* found federal preemption in the context of the original federal Clean Water Act, it seems at least unlikely that it would not have found general preemption in the far more comprehensive federal scheme that is set forth in the 1972 amendments.

including those state common law actions that had been held to be preempted by *Milwaukee I*. As this Court implied in *Milwaukee II*, the language of the savings clause cannot provide evidence of any intent by Congress to permit nuisance suits under the law of a non-source state:*

> The fact that the language of § 1365(e) is repeated *in haec verba* in the citizen-suit provisions of a vast arr..y of environmental legislation, see n.21 *supra*, indicates that *it does not reflect any considered judgment about what other remedies were previously available or continue to be available* under any particular statute." 451 U.S. at 329 n.22 (emphasis supplied).

Similarly without force is Respondents' claim that suggestions in the legislative history that Congress did not intend to foreclose existing private rights of action for damages constitute evidence that Congress intended to permit suits based on the law of a non-source state.** As

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* Moreover, this Court has consistently interpreted savings clauses, no matter how broadly written, to apply only when the state common law ostensibly "saved" was not in conflict with the regulatory scheme. *See, e.g., Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328-29 (1981); *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.") As discussed *infra*, pp. 12-17, permitting suits based on the law of a non-source state would plainly conflict with the federal scheme embodied in the FWPCA.

** This Court and the inferior federal courts have construed the FWPCA as foreclosing damage actions under the federal maritime and admiralty jurisdictions, which has the effect of extinguishing any right of action, even one primarily compensatory, in those cases where such federal jurisdiction is exclusive. *See Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Conner* v. *Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1747 (1985); *United States* v. *Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981).

enacted, the FWPCA leaves open the power of a source state to provide a private damage remedy as an aspect of the source state's regulatory scheme. *See* Brief of Petitioner, pp. 21-23. There is nothing to indicate that Congress' concern with providing some means of redress was intended as an expression of its desire to authorize suits for damages under the laws of a non-source state, a claim of jurisdiction over interstate waters which this Court had rejected in *Milwaukee I*.

C. The FWPCA Leaves No Room For the Exercise of Power by Non-Source States to Regulate Discharges.

As the Respondents suggest, preemption of all state regulation may be inferred "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulations" or where "the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' " *Hillsborough County, Florida* v. *Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985) (citations omitted), and state law may be nullified, to the extent that it conflicts with federal law, because compliance with both is a physical impossibility or "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress.' " *Id.*, citing *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

While the fact that a Congressional regulatory scheme is "comprehensive" * does not compel the conclusion that there has been total preemption of state law, *id.* at 2377,

* Respondents correctly observe that this Court's characterization of the FWPCA as "comprehensive" in *Milwaukee II* was expressly stated to be confined to the issue whether the need for federal common law was obviated. 451 U.S. at 317-319.

citing *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), it is clear that Congress may enact a federal regulatory scheme that neither permits nor contemplates supplemental regulation, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1958), or, as in this case, one which not only defines the federal regulatory role but also defines the regulatory role of the states. It is this feature of the FWPCA legislation which gives a unique twist to the preemption analysis, for it imposes the obligation not only to prevent conflict between the paramount federal regulatory scheme and state police power, but also to avoid conflict between the regulatory system adopted by source states carrying out the FWPCA program and the exercise of power by non-source states, while reflecting the distinction Congress made between the regulatory power of source states and the consultative role of non-source states.

It is almost inconceivable that Congress, having taken pains to avoid multiple regulation of a single source, would enact a system detailing and limiting the power of a source state to exercise regulatory jurisdiction, but at the same time foster a comprehensive jurisdiction of non-source states without limitation or standards or a federal umpire to prevent conflicts. As this Court has held, the FWPCA is "an all encompassing program of water regulation" intended to "establish a *comprehensive* long range policy for the elimination of water pollution," *Milwaukee II*, 451 U.S. at 318 (emphasis in original). Respondents can point to no evidence that it was intended merely to provide a policy for federal and source state regulation which could be altered, perhaps radically, by the uncontrolled exercise of the police power of non-source states.

Respondents argue that the FWPCA is not comprehensive because "[n]owhere in the FWPCA is provision made

for remedying inevitable pollution-caused private injuries," Brief of Respondents, p. 30, and cite *Silkwood* v. *Kerr-McGee*, 464 U.S. 238 (1983), for the proposition that this Court will infer a state based damage remedy if none is afforded by the federal statute. This effort to analogize the scheme embodied in the FWPCA to the regulatory scheme for nuclear plants with which this Court dealt in *Silkwood* is unavailing. It disregards the central fact that the Court in *Silkwood* faced two federal statutes dealing with nuclear plant safety, the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.*, which assigned exclusive regulatory jurisdiction over plant safety to the Nuclear Regulatory Commission, and the Price-Anderson Act, 42 U.S.C. § 2210(a), which reflected a congressional purpose to retain private state law damage remedies for injuries occasioned by the operation of such plants. In these circumstances, the primary issue for consideration was the reconciliation of the Price-Anderson Act policy of preserving the availability of state law damage remedies with the NRC's exclusive role as a regulator. Thus, in *Silkwood*, unlike this case, both the NRC's jurisdiction *and* the states' tort jurisdiction were supported by federal legislation, and, at least from the standpoint of preemption, the analysis dealt with reconciling conflicting *federal* policies.

Unlike *Silkwood*, there is built into the statutory scheme of the FWPCA a clear federal purpose to accord comprehensive regulatory jurisdiction over a given source to a *single* entity, either a federal authority or a source state authority which displaces the federal authority by satisfying the requirements laid down by the FWPCA. § 402(c), 33 U.S.C. § 1342(c) (A45-46). There is no federal policy expressed in the statute, or implicit in the statute, which supports a conflicting exercise of non-source state jurisdiction.

Nor do Respondents' contentions concerning "the historic interest of the states in providing precisely the relief withheld in the Act," Brief of Respondents, p. 30,* withstand scrutiny in the context of the federal/source state partnership established by the FWPCA. As we have urged in our main brief, the scheme created by the Act contemplates a broad discretion in the source state to exercise its regulatory jurisdiction to the fullest, and by any means it finds suitable, so long as it satisfies the FWPCA criteria. Brief of Petitioner, p. 11. Thus, while the statute does not contemplate any federal law damage remedy, it permits damage actions under the laws and in the courts of the source state.

Moreover, as is evidenced by the Act itself, Congress plainly took into account the interests of the federal government, the source state, and the non-source state in determining the balance most likely to achieve the underlying purposes of the Act. Congress itself expressly chose to subordinate the interests of non-source states to those of both source states and the federal government. See Brief of Petitioner, pp. 10-13.

As the Seventh Circuit observed in *Milwaukee III*,

> "[F]or a number of different states to have independent and plenary regulatory authority over a single discharger would lead to chaotic confronta-

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* Whether a state has an "historic interest" in providing a remedy for discharges into interstate waters from a second state is at best problematic. Although Respondents cite a number of cases where state X has entertained an action for an injury in state X resulting from an event in state Y, they cite—and we have found—no case before *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), where the event in state Y was a discharge into interstate waters. Such actions seem to have been treated historically as federal law, not state law, claims.

> tion between sovereign states. Discharger would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the [FWPCA] would be rendered meaningless." 731 F.2d at 414.

Certainly, at a minimum, this is a situation where "the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Silkwood* at 256.

Such a conclusion applies equally whether the state standard is imposed through the abatement of a nuisance under state law or through the award of either compensatory or punitive damages. The United States now contends, Brief of the United States as *Amicus Curiae*, pp. 22-24, that although the application of a non-source state's law to abate a source located in another state or to award punitive damages for harm originating out-of-state would conflict with the federal statutory scheme, the award of compensatory damages in an action involving private parties is not sufficiently "regulatory" to be preempted by the FWPCA. This argument, however, fails to consider that an award of damages, particularly for a continuing nuisance, has as much potential for completely disrupting the business of a discharger—and thus interfering with the mechanisms of the Act—as an abatement.*

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* As Respondents suggest (Brief of Respondents, pp. 35-37), the United States' labored effort to introduce into this case the distinction between "compensatory" and "regulatory" state law remedies that it argued, and lost, in *Silkwood*, finds no basis in the language of the FWPCA or in its legislative history. As argued in this case,

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As this Court has recognized in other contexts, *see, e.g., San Diego Bldg. Trades Council* v. *Garmon, supra,* the power to award damages, even if restricted to "compensatory" damages, provides a means for a non-source state to impose more stringent regulatory requirements on a discharger than the federal agency or a source state agency regard as appropriate, in direct contravention of the scheme established by Congress. The FWPCA does not merely preempt those state laws which conflict with the Act's ultimate goals; its preemptive effect extends to all state remedies whose imposition would conflict with the means by which these goals were intended to be achieved. *Cf. Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Perez* v. *Campbell,* 402 U.S. 637, 651-52 (1971) (effect of state statute, rather than purpose, governs preemption analysis). Allowing a non-source state to exercise power over a discharger located in another state would plainly interfere with the scheme embodied in the FWPCA and thus impede the achievement of the goals underlying the Act.

II.

To Make the FWPCA Effective, Only the Law of the Source State in the Courts of the Source State May Be Applied to Interstate Water Disputes.

Respondents contend that by arguing that any nuisance action brought under the law of the source state must be brought in a state or federal court in the source state,

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the purported distinction seems singularly arid, especially in view of the added suggestion, Brief of the United States as *Amicus Curiae,* p. 28, that although a court applying the law of a non-source state cannot grant "regulatory" remedies directly, it can impose such remedies if, under the source state's choice of law principles, it would grant "regulatory" remedies based on the law of the non-source state.

"Petitioner in effect is asking this Court to develop a wholly new common law rule of subject matter jurisdiction." Brief of Respondents, p. 38. According to both Respondents and the United States, this argument "equates legislative jurisdiction with judicial jurisdiction." Brief of Respondents, p. 38; Brief of United States as *Amicus Curiae*, p. 16. Neither of these arguments suggests a valid criticism of Petitioner's position.

It is not Petitioners who have suggested "a new common law of subject matter jurisdiction." Rather, the Seventh Circuit, in *Milwaukee III*, inferred from the scheme of the FWPCA as a necessary corollary to avoid conflict, an implicit rule of forum choice, which the Seventh Circuit (and the Solicitor General, *see* Brief for the United States in *Milwaukee III*, p. 13 n.12),* thought to be consistent with sound implementation of the comprehensive regulatory scheme it enacted.

The analysis of legislative jurisdiction *and* judicial jurisdiction necessarily starts with the statutory scheme Congress enacted and the consequences which flow from that enactment. After concluding that the FWPCA supported the competency of the source state to regulate interstate water sources by entertaining actions for damages and abatement, the Seventh Circuit concluded, correctly in our view, that it is necessary to confine such actions to courts in the source state if the careful balance of federal, source state and non-source state interests established in the FWPCA is to be maintained and the efficacy of the federal scheme preserved. Unless such a limitation is implied, dischargers located on

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* The Solicitor General fails to offer any explanation for the contradiction between its present position and its endorsement of the Seventh Circuit's holding in *Milwaukee III* that federal courts in non-source states were precluded from entertaining actions against discharges into interstate waters from another state.

interstate bodies of water may be sued in every state on which that body of water touches. Even if the law applied in each instance is substantively the law of the source state, the goals of avoiding interstate conflict and ensuring a comprehensive, non-duplicative and effective system of pollution control that Congress sought to achieve in enacting the statute would be frustrated. Given the "vague" and "indeterminate" nature of the common law of nuisance, *Milwaukee II*, 451 U.S. at 317, allowing the law of the source state to be applied in the courts of other states would create the same potential for conflict as allowing each state to apply its own substantive law.

The entirety of the source state's law, including private actions to abate or compensate for a discharge into interstate waters, must be seen as an implementation of the FWPCA's decision to allocate the regulation of such discharges to the source state, if it chooses to act in conformity with federal statutory criteria. The choice of forum to carry out the source state's total regulatory scheme is as much an aspect of the implementation of such regulation as is the choice of substantive law. Sensible implementation of the express congressional direction to give paramountcy to source state regulation and to avoid multiple regulation compels allocation of the responsibility for enforcement of the source state's substantive law to the courts in the source state as the only effective means of avoiding multiple regulation and conflicting applications.

Conclusion

The FWPCA reflects an all-encompassing federal scheme to regulate the use of navigable and interstate waters, a scheme which assigns a paramount role to source state regulation so long as such regulation meets minimal federal requirements. This is a scheme that ensures a uniform and comprehensive system of regulation and avoids the disruptive and intrusive effects of multi-state regulation. The efficacy of this federal scheme, however, depends entirely on preserving the careful balance Congress established between federal, source state and non-source state interests. The construction of the FWPCA adopted by the Courts below and urged by both Respondents and the United States, a construction premised on a misapprehension of the fundamental nature of the act, emasculates the federal scheme and effectively destroys its ability to deal adequately and appropriately with the significant problems it was designed to address. Such a construction must be rejected if the FWPCA is to be given the effect intended by Congress.

Dated: New York, New York
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No. 85-1233

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY, PETITIONER

v.

HARMEL OUELLETTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether federal law has preempted the availability of a nuisance action by owners or lessees of private property brought in the state in which the property is located either to abate or to recover damages caused by an out-of-state discharge into interstate waters.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1233

INTERNATIONAL PAPER COMPANY, PETITIONER

v.

HARMEL OUELLETTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

On March 24, 1986, the Court invited the Solicitor General to express the views of the United States in this case.

STATEMENT

1. This case is the third in a series to reach this Court concerning the adverse effects on Vermont and its citizens of effluent discharges into Lake Champlain from a paper mill owned by petitioner International Paper Company (IPC) and located in the State of New York. The controversy was first before the Court in 1970, when the State of Vermont brought an original action in this Court against the State of New York and IPC based on IPC discharges into Lake Champlain, seeking both injunctive and monetary relief. The Court granted Vermont leave to file its complaint and appointed a Special Master to hear the matter, after which the United States intervened as a party. *Vermont* v. *New York*, 406 U.S. 186 (1972), 408 U.S. 917 (1972), 409 U.S. 1103 (1973).

The Court rejected the Special Master's Report (417 U.S. 270 (1974)), and ultimately dismissed the complaint after the parties entered into a settlement agreement and jointly moved for dismissal (419 U.S. 955 (1974)).

Subsequent to the filing of Vermont's original action, but prior to dismissal of that complaint, the Court considered related private claims against IPC in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973). In *Zahn*, the Court affirmed the lower courts' dismissal of a class action brought in federal district court (based on diversity) by Vermont landowners and lessees of Lake Champlain lakeshore property, who challenged the legality of the IPC discharges into the lake. Members of the class sought compensatory and punitive damages. Because, however, not every member of the class had suffered pollution damage in excess of $10,000, this Court held that the jurisdictional amount requirement had not been met (*id.* at 292, 301).

The present action commenced in 1978, when respondents, landowners or lessees of Lake Champlain lakeshore property located in three towns in the State of Vermont,[1] brought this class action in Vermont superior court against IPC, based on its plant's discharges of effluent

[1] The plaintiff class in the current lawsuit differs from that defined in the prior *Zahn* litigation only with respect to the towns covered. Both actions included landowners and lessees in the Towns of Shoreham and Bridport, but the current lawsuit substitutes such persons in the Town of Addison for those in the Town of Orwell. Compare J.A. 28 with *Zahn* v. *International Paper Co.*, 53 F.R.D. 430, 430 (D. Vt. 1971). In addition, the IPC paper mill at issue is not the same mill that was initially the subject of Vermont's original action and the *Zahn* litigation. The original IPC plant was closed down in 1970 and replaced by a plant (the subject of this litigation) located a few miles to the north. Vermont's complaint in the original action was amended to cover the new plant and the settlement agreement applied to that plant. See Plaintiff's Mot. for Leave to Interpose Amended and Supp. Complaint, Exh. A, at 3, *Vermont* v. *New York*, 406 U.S. 186 (1972); Agreement of Settlement between Vermont and IPC (J.A. 113-116).

into Lake Champlain (Pet. App. A6; J.A. 27-37).[2] Respondents allege the IPC discharges are "foul, unhealthy, smelly, and aesthetically unpleasing," "detrimental to the Lake, and its fish and plant life," and "interfere with [respondents'] use and enjoyment of their property" (J.A. 28-29). Respondents seek both injunctive relief and money damages based on five separate counts alleging that the discharges: (1) constitute "a continuing nuisance"; (2) violate IPC's federal national pollution discharge elimination system (NPDES) permit; (3) interfere with respondents' rights as riparian owners; (4) negligently violate a "duty" IPC owes respondents; and (5) "are malicious, willful, and undertaken with reckless and wanton disregard of [respondents'] rights" (J.A. 27-34). In particular, respondents request that IPC be ordered to relocate its water intake system closer to its discharge outlets and that respondents be awarded $20,000,000 in actual damages (*id.* at 29, 30, 31, 32). In addition, respondents seek an award of $100,000,000 in punitive damages based on their allegations that IPC has engaged in "malicious" and "willful" misconduct (*id.* at 33).

Soon after respondents filed their complaint, petitioner removed the case to federal district court in Vermont, based on diversity jurisdiction (28 U.S.C. 1332(a)). In April 1980, the district court certified respondents' plaintiff class (86 F.R.D. 476). The district court subsequently added the State of Vermont as a member of the class based on its status as a riparian landowner (see Pet. App. A18 n.5).

In June 1981, IPC moved to dismiss respondents' complaint on the ground that respondents' interstate water

[2] Respondents' complaint also includes a separate cause of action (on behalf of a more broadly defined class) based on petitioner's emissions of pollutants into the ambient air (J.A. 34-37). Because the petition for a writ of certiorari and the decisions below concern only the cause of action alleging interstate water pollution, we do not address the separate class action based on interstate air pollution.

pollution claims are rooted in state law, which had been preempted by federal law (Def. Memo in Support of Mot. to Dis. 12-22; Def. Supp. Memo in Support of Mot. to Dis. 6-9). Alternatively, IPC argued that even if some potentially applicable state law remained viable, the only state law surviving federal preemption would be the law of the state in which the discharger is located (New York law),[3] and that only courts located in New York could entertain interstate water pollution claims based on New York law (Pet. App. A7; Reply Br. 5 n. *). Therefore, IPC contended, respondents' claim should be dismissed on the alternative ground that because their suit was brought in a court located in Vermont (including a federal district court sitting in Vermont), respondents could not rely on the only state tort law that might remain (*ibid.*).

2. In February 1985, the district court denied petitioner's motion to dismiss, ruling that federal law does not generally preclude courts located in Vermont from hearing such claims under Vermont law (Pet. App. A4-A25), and indicating that Vermont choice of law rules would determine whether the nuisance law of Vermont or New York applies in this case (*id.* at A16, A24-A25).[4]

3. On interlocutory appeal, the court of appeals affirmed in a per curiam opinion, adopting the district court's opinion in "all respects" relevant to the nuisance preemption claim at issue here (Pet. App. A2-A3).

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[3] For the purposes of this submission, we will refer to the state in which the source of pollution is located as the "source state" and the state adversely affected by the interstate pollution as the "affected state."

[4] The district court also rejected IPC's claims that respondents' riparian rights had been resolved in prior proceedings (the agreement Vermont entered into with IPC settling Vermont's original action) and that respondents do not possess standing to maintain a cause of action for nuisance (Pet. App. A7, A21-A25). These rulings were affirmed by the court of appeals (*id.* at A2-A3). Because IPC expressly limits its petition for a writ of certiorari to the nuisance preemption claim, the validity of these other rulings is not at issue here (Pet. i, 4 n.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents' complaint states a claim under the common law of nuisance based on IPC's interstate discharges, but nowhere suggests that the applicable source of nuisance law must be Vermont and not New York law. To the contrary, respondents rely on whichever state's nuisance law may apply under federal preemption principles and state choice of law rules.[5] For this reason, IPC's motion to dismiss the nuisance cause of action requires acceptance of one of two alternative legal arguments: either (1) federal law has preempted both New York's and Vermont's nuisance laws; or (2) only New York nuisance law remains, but federal law precludes courts in Vermont (including a federal district court located in Vermont) from applying New York law. Neither of these contentions is tenable, however, because the federal Clean Water Act expressly preserves New York common law and Vermont courts, particularly a federal district court sitting in Vermont, undoubtedly retain jurisdiction to apply New York law. On this basis alone, denial of IPC's motion to dismiss was proper.

Because, however, the courts below did not so narrowly confine their rejection of IPC's motion, this case also

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[5] See, *e.g.*, Plaintiffs' Supp. Memo in Opp. to Def. Mot. to Dis. 4-5 ("Applying the principles of the [Seventh Circuit's 1984 decision in] *Illinois* v. *Milwaukee* * * * to this case, it is clear that Plaintiffs can maintain the action based on New York common law. The Complaint in this matter does not specify the jurisdiction of the common law it invokes or make a choice of law. * * * Therefore, there is no basis for dismissing the present suit. * * * Plaintiffs maintain their right to invoke Vermont common law and do not waive any right to have it apply * * *. [S]hould[, however] this Court choose to follow [the Seventh Circuit] it must allow the case to go forward based upon New York law."); Appellees Br. 37 n.9 ("While Plaintiffs maintain their right to invoke Vermont common law and do not waive any right to have it apply, should this Court choose to follow the Seventh Circuit, it must allow the case to go forward based upon New York common law, which is in all respects nearly identical to that of Vermont.").

presents the more difficult question whether federal law has preempted the availability of any portion of Vermont's nuisance law. The district court's opinion, adopted by the court of appeals, was partially rooted in its conclusion that Vermont nuisance law was available in full force. The court appeared to suggest that either New York or Vermont law could govern all aspects of this case, depending solely on Vermont choice of law principles (under *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). This aspect of the court's opinion, while unnecessary to the result of rejecting IPC's motion to dismiss, is, in our view, erroneous in its broad and unlimited scope. It is our submission that respondents may not rely on Vermont nuisance law to support either an abatement remedy or a punitive damages award, unless New York law would itself call for application of Vermont law. In the Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, Congress deliberately assigned the federal government and the source state (New York) the preeminent roles in fashioning effluent limitations and standards, including those applicable to sources of interstate pollution. Allowing respondents unilaterally to invoke the law of Vermont *to abate* IPC's discharges either directly through the award of injunctive relief or indirectly through the award of punitive damages would conflict with the federal scheme by allowing, in effect, the law of the affected state to impose more stringent regulatory requirements on the discharger, regardless of the desires of the federal agency or source state.

A claim for compensatory relief based on Vermont nuisance law is not, however, subject to the same federal preemption limitations. Historic reasons for ousting application of state law in the interstate pollution context do not properly apply to such a private action for damages. And, specifically, the federal Clean Water Act and its legislative history explicitly preserve any otherwise applicable state common law damage remedies, even when a discharger is in compliance with federal requirements.

Those requirements are based on considerations applicable to industry and water quality on a categorical basis, and do not purport to judge the reasonableness of harms caused by a particular discharger.

We are not unaware of the problems presented to an interstate discharger located in one state facing the prospect of private damage actions for compensatory relief in additional states under varying state laws. Of course, almost any business endeavor that engages in substantial interstate commerce and is exposed to significant tort liability could express similar policy concerns. The relevant policy choices, however, are for Congress to make in the first instance and not, absent a constitutional basis (and we perceive none), for the judiciary to impose. For now, Congress has purposely left unfettered state tort law private damage remedies for compensatory relief for water pollution. Hence, applicable state choice of law principles designate the state law to govern any particular controversy involving more than one state, as they do in most areas of traditional tort law. IPC's avenue of redress must be with Congress and not this Court.

Finally, while our views rest upon our own analysis, we note that the position IPC now takes appears to depart from the position it advanced to this Court on two prior occasions in closely related litigation. First, in *Vermont* v. *New York*, *supra*, the original action Vermont brought in 1970, IPC resisted this Court's jurisdiction essentially on the theory that it was amenable to suit in Vermont state courts, as well as in New York state courts.[6] Indeed, IPC maintained that Vermont law

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[6] At oral argument, counsel for IPC left no doubt that the company could be sued in Vermont courts:

> Q: Do you concede that International Paper is amenable to service of process in Vermont?
>
> A: We contend * * * that we are suable in Vermont, we're suable in New York, we're ready to stand suit there, there's no question about that. This is the really available alter-

would govern the dispute whether it was litigated in Vermont courts or New York courts, based on the notion that the latter courts would likely apply the law of the state in which the injury occurred.[7] IPC distinguished a private damage action from a sovereign abatement action and suggested that the former should be a matter of state law.[8]

It could be suggested that IPC's position at that time was based on its understanding of the law just prior to this Court's decision in *Illinois* v. *City of Milwaukee* (*Milwaukee I*), 406 U.S. 91 (1972) and congressional passage of the Clean Water Act.[9] However, IPC basically adhered to the same position before this Court in the *Zahn* litigation, which occurred *after* both *Milwaukee I*

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native that the State of Vermont has against us insofar as remedy goes. There's no doubt about that.

* * * * *

[W]e are subject to suits in Vermont. We never have questioned it. Also in New York.

Tr. 39-40, 41. See also IPC Br. in Opp. 23 ("International Paper Company is subject to suit in Vermont").

[7] Q: Let's assume you're sued in Vermont, what would be the governing law?

A: I would think the State of Vermont law. * * *

Q: And the suit in New York the same?

* * * * *

A: * * * If we're sued in New York, I would think that the New York Court would look to the Vermont law, because that's the place where the injury occurred.

Tr. 41-42.

[8] See IPC Br. in Opp. 23; Tr. 34.

[9] We do not read this Court's decision to grant Vermont leave to file its complaint in the original action as a repudiation of IPC's arguments. In light of the exclusive nature of this Court's original jurisdiction in controversies between States, the Court's action may well have reflected the possibility that New York was a necessary party to the litigation because of the location of a controversial sludge bed within New York's borders (see 417 U.S. at 270, 276-277 n.6).

and enactment of the Clean Water Act. IPC reiterated then that it was amenable to suit in Vermont courts.[10] IPC also maintained that state law, and not federal common law, would govern, specifically resisting the notion (it now appears to advance) that *Milwaukee I* bore on the availability of a private action for damages under state law to redress interstate water pollution.[11] Still,

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[10] See Tr. 32, 33 ("My client is sueable [*sic*] in the state courts of Vermont. * * * We can be sued there.").

[11] Q: Have you considered our decision in *Illinois and the City of Milwaukee?*

A: I have indeed, your Honor. I'd be glad to answer questions about it.

* * * * *

Q: Well, I was just wondering, though, after *Illinois and Milwaukee*, we said federal law governs, federal common law. It had still to be developed. Would the district court be free to apply state law? * * *

A: Your Honor, I see the difference between *Illinois against Milwaukee* on the one hand and this case on the other. *Illinois-Milwaukee* was an action to abate a public nuisance of large measure. This is an action for money damages. * * * They are not trying to abate. If they wanted to abate, they have other remedies. Indeed, under the Federal Water Pollution Control Act of 1972, citizen suits of large measure—

* * * * *

A: * * * *Illinois against Milwaukee* * * * says nothing about actions brought by private people, actions brought by estate [*sic*] to abate.

Q: Certainly if you take a case like *Georgia against Tennessee Copper*, where the Court intimated that there would be a kind of federal common law rule, there is no intimation there that the same rule would govern action between private parties, is there?

A: None, whatever, * * * the Court indicates that you would be slow to apply this doctrine to private claims. *Illinois against Milwaukee* also * * * spoke of the state's right, a quasi-sovereign right in ecological purity. That is not this case. This is a strict common law, border play for money damages * * *.

Tr. 22-25. See also IPC Br. 20 n.7.

whatever inconsistencies may exist in IPC's positions, resolution of the preemption issue now before the Court must turn on the intent of Congress, the issue which we address below.

ARGUMENT

RESIDENTS OF VERMONT MAY MAINTAIN A COMMON LAW NUISANCE ACTION AGAINST A SOURCE OF WATER POLLUTION LOCATED IN NEW YORK UNDER WHICHEVER NUISANCE LAW APPLICABLE STATE CHOICE OF LAW PRINCIPLES DESIGNATE, EXCEPT THAT FEDERAL LAW REQUIRES THAT ANY ABATEMENT REMEDY OR PUNITIVE DAMAGES BE BASED ON THE STATE LAW DESIGNATED BY NEW YORK LAW

This case raises the question left open by this Court's decision in *City of Milwaukee* v. *Illinois* (*Milwaukee II*), 451 U.S. 304, 310 n.4 (1981): the extent to which a plaintiff may rely on state common law in a suit brought against an out-of-state source of water pollution.[12] The courts below held that a plaintiff in Vermont could rely on Vermont nuisance law (or New York law if designated by Vermont choice-of-law rules) either to abate or to seek money damages for interstate water pollution caused by a discharger located in New York. IPC asks this Court to reverse that ruling, arguing, in effect, that the special problems faced by a source of interstate water pollution--including the prospect of multiple suits in different states and under varying state laws—require a special rule of federal preemption that would either totally immunize the source from suit based on *any* state's law or, alternatively, at least remove it from the jurisdiction of any court except for those located in the same state

[12] *Milwaukee II* held that the federal common law remedy recognized in *Milwaukee I* had been superseded by federal statute. *Milwaukee II* did not address the possibility that Illinois could maintain an action under Illinois law for the discharges in Wisconsin; the Court denied Illinois' cross-petition on that issue. See 451 U.S. 982 (1981); see also 451 U.S. at 310 n.4.

as the source. While we agree that the courts below erred in holding that Vermont nuisance law is fully available, we also believe that IPC seeks a far too sweeping and unsupported rule of federal preemption.

The role of federal law in this controversy is neither as limited as the courts below suggest nor as broad as IPC urges. The Clean Water Act limits the availability of Vermont nuisance law because the unilateral imposition of Vermont law on a discharger located in New York is inconsistent with that federal statute when, as in this case, plaintiffs seek abatement and punitive damages. The federal statute, however, leaves undisturbed both New York nuisance law (the law of the source state) and a remedy under Vermont nuisance law for compensatory relief, leaving remaining choice of law questions to the application of traditional rules. Moreover, except for traditional due process limitations, federal law in no manner dictates the judicial forum in which the suit must be brought. Accordingly, while we do not agree with the full breadth of the decision below, we submit that IPC's motion to dismiss was properly denied.

A. Federal Law Expressly Preserves The Common Law Of The State In Which The Polluting Source Is Located

IPC's threshold argument below was that federal rather than state law governs interstate water pollution and, consequently, respondents may not maintain a lawsuit based on the nuisance law of either the source state (New York) or the affected state (Vermont).[13] This argument relies on a seemingly straightforward, yet flawed, reading of this Court's decisions in *Milwaukee I* and *Milwaukee II*, with the former standing for the proposition that federal (not state) law governs interstate water pollution disputes and the latter simply holding that federal statutory law has supplanted federal common law.

[13] Pet. App. A7; see Def. Memo in Support of Mot. to Dis. 13-28; Def. Reply Memo in Support of Mot. to Dis. 1-10; Def. Supp. Memo in Support of Mot. to Dis. 6-9.

First, *Milwaukee I* did not limit the normal police power of a state to impose more stringent effluent requirements or more expansive tort liability on sources of pollution within the state's borders than might be supplied by federal law, whether statutory or common law. Although isolated statements in several of this Court's opinions could be read as supporting that extreme result,[14] the rationale of *Milwaukee I* does not extend so far. The "controlling principle" for fashioning federal common law in *Milwaukee I* was that " 'the ecological rights of a State in the improper impairment of them from sources outside the State's own territory' " should be a matter of federal law. 406 U.S. at 99-100 (quoting *Texas* v. *Pankey*, 441 F.2d 236, 240 (10th Cir. 1971)); see also *Milwaukee II*, 451 U.S. at 335 (Blackmun, J., dissenting) ("[the] laws of one State cannot impose upon the sovereign rights and interests of another"). Such concerns are totally absent when a state seeks to impose more stringent requirements on sources of pollution within its own borders. The only effect on the neighboring state is beneficial: a decrease in pollution from out-of-state sources. There is accordingly no reason to assume that *Milwaukee I* intended to immunize from state regulation pollution from in-state sources that happens to contribute to interstate pollution, particularly when, as the *Milwaukee I* Court itself recognized (406 U.S. at 104), the then applicable federal water pollution control legislation expressly preserved " '[s]tate and interstate action to abate pollution of interstate or navigable waters' " (*ibid.*, quoting Federal Water Pollution Control Act of 1948, § 10(b), 33 U.S.C. (1970 ed.) 1160(b)).

[14] See, *e.g.*, *Milwaukee II*, 451 U.S. at 313 n.7 ("[i]f state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used"); *id.* at 335 (Blackmun, J., dissenting) ("the Court has fashioned federal law where the interstate nature of a controversy renders inappropriate the law of either State"); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("the interstate * * * nature of the controversy makes it inappropriate for state law to control"); see also Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.119 (1964).

Moreover, the second half of IPC's argument—that *Milwaukee II* simply held that federal statutory law has since supplanted federal common law—misapprehends the full import of the congressional enactment. For, under the very terms of the comprehensive federal water regulatory program established by the Clean Water Act, it is clear that Congress did not intend to preempt, in any fashion, the authority of a state to impose more stringent regulatory requirements or more expansive tort liability on in-state sources, regardless of the ultimate location of any harm resulting from the pollution. Section 510 (33 U.S.C. 1370), in particular, provides "that States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance laws and apply them to *in-state dischargers*" (*Milwaukee II*, 451 U.S. at 328 (emphasis added)).[15] Notably, when Congress has determined that overriding federal interests require preemption of more stringent state law re-

[15] Section 510 provides:

> [N]othing in this [Act] shall (1) preclude or deny the right of any State * * * to adopt or enforce [any effluent limitation or standard] * * * except that * * * [a] State * * * may not adopt or enforce any effluent limitation, or * * * standard * * * [that] is less stringent than [one adopted] * * * under this [Act]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. 1370. See also 33 U.S.C. 1316(c) (emphasis added) ("Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources *located in such State.*"); 33 U.S.C. 1318(c) (emphasis added) ("Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources *located in such State.*").

quirements on a source of pollution, Congress has explicitly so provided. See, *e.g.*, 33 U.S.C. 1322(f) (limiting more stringent state regulation of marine sanitation devices); see also 42 U.S.C. 7416, 7543, 7545(c)(4), 7573 (preempting certain state air pollution regulation of moving sources). Here, however, Congress has specifically chosen to preserve, rather than preempt, the authority of the source state to impose more stringent standards on dischargers of interstate pollution within its own borders, and the courts must defer to that legislative judgment.[16]

Congress did not, moreover, evince any intent to preempt the authority of the source state to impose tort liability for damages on dischargers located within its borders. Indeed, Congress deliberately eschewed any effort to touch on the issue of private damages for water pollution in the Clean Water Act. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-18 & n.27 (1981). The Act's citizen suit provision is confined to injunctive relief to enforce effluent standards or limitations established by the Act (33 U.S.C. 1365; *Sea Clammers*, 453 U.S. at 14), or the imposition of civil penalties for violation of those regulatory requirements, with any penalties recovered going to the United States Treasury.[17] Neither the statutory language nor the legislative history of the Clean Water Act suggests Congress intended to immunize from state common law damage remedies even those parties com-

[16] There is, of course, no occasion to utilize the negative implications of the dormant Commerce Clause to prohibit state action that Congress has authorized. Cf. *Northeast Bancorp, Inc.* v. *Board of Governors*, No. 84-363 (June 10, 1985).

[17] The statement in this Court's recent opinion in *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 9 (as revised), that the Water Act "made available civil penalties for violations of the Act" should not be read as intending that private parties themselves retain the penalties, in light of the clear legislative history to the contrary. See H.R. Rep. 92-911, 92d Cong., 2d Sess. 133 (1972); S. Rep. 92-414, 92d Cong., 1st Sess. 79 (1971).

plying with the Clean Water Act's strict regulatory requirements. The effluent limitations and standards established by the Act are based on certain statutorily prescribed cost and technological considerations applicable to industry on a categorical basis, and not on the reasonableness of the harm caused by a particular discharger. See generally *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977); *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64 (1980); see also 40 C.F.R. 122.5(c) ("The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations."). The Senate report on the bill speaks directly to the issue, specifically noting that damage remedies under state law would remain available:

> [I]f damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

S. Rep. 92-414, 92d Cong., 1st Sess. 81 (1971); see *Sea Clammers*, 453 U.S. at 16 n.26; see also *New Jersey* v. *City of New York*, 283 U.S. 473, 482-483 (1931).[18]

B. Federal Law Does Not Preclude Courts (Including A Federal District Court) Located In Vermont From Hearing A Nuisance Claim Based On Interstate Pollution Even If That Claim Must Be Based On New York Nuisance Law

We have shown that federal law has not preempted the law of New York (the source state). It follows that IPC's motion to dismiss was properly denied unless federal law nevertheless precludes courts in Vermont from hearing a nuisance claim based on New York law.

[18] See *Ferebee* v. *Chevron Chemical Co.*, 736 F.2d 1529, 1540 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984) ("The fact that EPA has determined that [the practice] is adequate for purposes of [the federal regulatory statute] does not compel a jury to find that the [practice] is also adequate for purposes of state tort law as well" (emphasis omitted)).

IPC argues (Pet. App. A7; Reply Br. 5 n.*, 7) that federal law precludes courts located in Vermont (including a federal district court) from hearing a New York-based nuisance law claim on essentially the same ground that IPC argues that Vermont law has been preempted. IPC, in effect, equates legislative jurisdiction with judicial jurisdiction.[19] See Reply Br. 7. Notably, IPC's theory extends (*id.* at 5 n.*), as it must in this case, to a federal district court located in Vermont sitting in diversity jurisdiction. The only legal authority IPC cites in support of its novel argument is an analogy to Section 505(c) of the Clean Water Act, which provides that citizen suits to enforce effluent limitations and standards established by the Act can be brought "only in the judicial district in which such source is located" (33 U.S.C. 1365(c)).

Whatever weight IPC's contention might have as a matter of policy, its legal argument is wholly insubstantial. It is simply too late in the day to argue that courts in one jurisdiction may not, in the absence of a specific legislative or constitutional prohibition, apply the law of another state. Section 505 of the Clean Water Act, moreover, does not aid IPC's cause. Section 505 concerns citizens suits brought under the Clean Water Act to enforce that Act's requirements. This case does not involve such a suit, but a private action brought under state nuisance law.[20] Manifestly, a congressional decision to

[19] IPC does not claim that the Vermont courts, including the Vermont federal district court, lacked personal jurisdiction over it in this case. Instead, IPC advances a general federal rule of venue or subject matter jurisdiction applicable to private nuisance suits based on interstate pollution.

[20] Respondents' complaint does include one count based on an alleged violation of IPC's NPDES permit. The validity of that count, however, was not addressed in the opinions below, nor is it discussed in the petition for a writ of certiorari. In all events, there is no suggestion in the complaint that respondents intend to maintain a citizen suit based on the Clean Water Act. Instead, the claim appears to assert a private right of action for damages under that

establish venue requirements for the enforcement of a particular federal statute cannot justify a judicial extension of those requirements beyond the Act's terms.[21]

C. Federal Law Has Preempted The Availability Of Abatement And Punitive Damage Remedies Under Vermont Nuisance Law Against A Discharger Located In New York Unless New York Law Would Itself Call For Application Of Vermont Law, But Does Not Preempt A Claim For Compensatory Damages Under Vermont Law

1. While not strictly necessary to the proper disposition of IPC's motion to dismiss, the courts below also addressed the more difficult question whether federal law has preempted the nuisance law of the state adversely affected by interstate pollution, here Vermont. The lower courts concluded that federal law has left Vermont law undisturbed. We disagree. In our view, federal law clearly preempts Vermont nuisance law as a legal basis for *abating* a source of pollution located in New York, unless New York law would itself call for application of Vermont law. Absent such "consent" to an interstate application of state law by New York, the imposition of Vermont law to *abate* a discharger in New York would be inconsistent with the rationale of *Milwaukee I* and would, in any event, conflict squarely with the comprehensive statutory scheme for water pollution abatement Congress established in the Clean Water Act.[22]

Act, an avenue subsequently foreclosed by this Court in *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

[21] IPC's claim that Vermont courts may possibly be biased is, of course, equally true of New York courts (see, *e.g.*, *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971)), which is why federal diversity jurisdiction potentially exists in a case such as this one. See 3 J. Elliot, *Debates on the Federal Constitution* 487 (1836) (remarks of James Madison).

[22] The Tennessee Supreme Court recently came to this conclusion, dismissing an abatement action brought by Tennessee against a

As we have discussed (pages 12-13, *supra*), *Milwaukee I* was premised on the notion that application of the law of one state to abate interstate pollution caused by a source located in another state is generally inconsistent with the sovereign rights of states to control sources of pollution within their own borders (subject, of course, to supervening exercise of congressional power). The courts below did not dispute the correctness of this basic premise (Pet. App. A10), but reasoned that subsequent developments—specifically the enactment of the Clean Water Act in 1972—had somehow "authorized" the application of previously preempted Vermont law (Pet. App. A11). We agree that the Clean Water Act is the appropriate touchstone for preemption analysis,[23] but submit that the Act's terms leave no doubt that Vermont's nuisance abatement remedy is preempted, unless New York law itself required application of Vermont law.

The linchpin of the Clean Water Act is the national pollution discharge elimination system (NPDES) permit program, which the federal government either administers itself or, if certain conditions are met, delegates to the source state for administration. 33 U.S.C. 1311, 1312, 1316, 1317, 1328, 1342 and 33 U.S.C. (& Supp. II) 1344. Without a NPDES permit, any discharge into navigable waters is unlawful (33 U.S.C. 1311(a)). Effluent limitations and standards imposed by the permits are generally derived from two primary sources: technological requirements established by the federal government (33 U.S.C. 1311(b), 1314(a) and (b), 1316, 1317) and water quality standards the states may develop in the first instance for waters within their respective jurisdictions. These effluent requirements may be increased, as previously noted (pages 13-14, *supra*), should the source state wish to impose more stringent abatement requirements on dischargers located within its borders. In short, the unambiguous focus of the Clean Water Act is on establishing a partnership between the federal and state governments for the abatement of discharges originating within each state's borders, with the latter being allowed both to administer the permit program and to impose more stringent requirements.[24]

Congress, moreover, deliberately chose to assign a preeminent position to the source state in the interstate pollution context, conferring upon the affected neighboring state only an advisory role in the formulation of applicable effluent standards or limitations.[25] The affected state may try to persuade the federal government or the source state to increase effluent requirements, but ultimately possesses no statutory authority to compel that result, even when its waters are adversely affected by out-of-state pollution. See 33 U.S.C. 1341(a)(2), 1342(b)(3) and (5), 1344(g)(1), (h)(1)(C) and (E);

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discharger located in North Carolina on the ground that interstate application of Tennessee law was preempted by the Clean Water Act. See *Tennessee* v. *Champion International Corp.*, No. 85-36-I (filed Apr. 21, 1986).

[23] As in any preemption case, the question here is basically one of federal statutory interpretation. See Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 38 (1985); see also Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 958 (1986).

[24] See, *e.g.*, 33 U.S.C. 1311(m) (providing for modification of certain effluent limitations with concurrence of state for "discharges by an industrial discharger in such State"); 33 U.S.C. 1341(a)(1) (prior to receipt of federal NPDES permit, discharger must first obtain certification "from the State in which the discharge originates").

[25] To be sure, the Clean Water Act provides both citizens and the governor of an affected state with specific enforcement authority, but those suits are limited to enforcement of the effluent limitations and standards established by the Act, which, as just described, are determined by EPA and supplemented only by the source state. See 33 U.S.C. 1365(a), (b) and (h); see also S. Rep. 92-414, 92d Cong., 1st Sess. 79 (1971) ("Section 505 [does] not substitute a 'common law' or court-developed definition of water quality. [The applicable] effluent control limitation or standard, would * * * have been settled in the administrative procedure leading to the establishment of such effluent control provision.").

Milwaukee II, 451 U.S. at 325-326; see also 33 U.S.C. 1319(a), 1344(s)(2).[26]

Allowing respondents to invoke the law of Vermont to *abate* IPC's discharges would squarely conflict with the federal scheme because the law of the affected state would thereby be enabled to impose more stringent regulatory requirements on the discharger, regardless of the desires of the federal agency or source state. Such a result would both significantly "impair[] the federal superintendence of the field" Congress clearly envisioned in the Clean Water Act (see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963)) and conflict with the "full purposes and objectives of Congress" in providing the source state with sole authority to supplement federal requirements (see *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted)). For this reason, we disagree with the lower courts' conclusion that respondents' request for injunctive relief can necessarily be maintained under Vermont nuisance law. To the extent that respondents seek *abatement* of IPC's discharges through forced technological modifications of IPC's facility, they can look only to federal law or New York law, including the latter's nuisance law—unless, of course, New York law would itself require application of Vermont law, since, then, the conflict presented by unilateral imposition of Vermont law on a New York discharger would be eliminated.[27]

The courts below reached a contrary conclusion based, first, on an overly generous reading of the Clean Water

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[26] Indeed, the record suggests that Vermont exercised its advisory function in this case and succeeded in convincing the permitting agency to impose more stringent abatement requirements on IPC (see J.A. 65-68).

[27] We note that IPC has previously suggested to this Court that New York law would call for application of Vermont law. See pages 7-8 note 7, *supra*. See also *Cousins* v. *Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915 (1978) ("*lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances").

Act's two non-preemption provisions (Pet. App. A11-A17) and, second, on an underestimation of the inconsistency between the statutory structure of the Act and allowing application of an abatement remedy based on Vermont law (*id.* at A17-A20). We do not question that the Clean Water Act expressly preserves state law to a specified extent, but, contrary to the rulings below, the Act does not "authorize" the availability of state law to abate a discharge in another state. As discussed above, Section 510 of the Act, 33 U.S.C. 1370, expressly permits a state to set pollution standards more restrictive than the federal standard. This Court has recognized, however, that this authority is limited to discharges occurring within the borders of that state. *Milwaukee II*, 451 U.S. at 327-328. Indeed, Section 510(2), 33 U.S.C. 1370(2), was adopted from an almost identical provision of the 1948 Act, as amended, 33 U.S.C. (1970 ed.) 1151(c), which the Court in *Milwaukee I* found insufficient to establish an intent by Congress not to preempt the law of the non-source state in this regard. See 406 U.S. at 102. Section 505(e), 33 U.S.C. 1365(e), similarly does not "authorize" a state law remedy to abate out-of-state discharges. As this Court noted in *Milwaukee II*, 451 U.S. at 328-329, Section 505(e) addresses only the preemptive scope of the citizen suit provision of Section 505 and "means only that the provision of such suit does not revoke other remedies." It does not address the broader issue of the preemptive scope of "the Act as a whole" (see 451 U.S. at 329).

In addition, the district court erroneously concluded that the application of a Vermont abatement remedy was not preempted because it would not "interfere with the objectives of the Act[,]" which the court characterized as the "elimination of the discharge of pollutants" (Pet. App. A17, A18). The preemptive scope of the Clean Water Act, however, is not limited simply to conflicts with the Act's ultimate goals (see 33 U.S.C. 1251(a)), but extends to state laws that conflict with the statutory mechanisms the Act establishes to reach those goals. See

Michigan Canners & Freezers Ass'n v. *Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 477 (1984). Here, unilateral application of Vermont nuisance law to abate a source in New York would, as we have explained, conflict with the federal statutory scheme. That the intrusion is created by the application of Vermont *common law* instead of Vermont *statutory law* is of no legal consequence. The object of federal preemption is the interstate application of the abatement remedy, whatever the source of that remedy in the affected state's law.

2. Whether federal law has similarly preempted any *damage remedy* respondents might look to under Vermont nuisance law presents a closer and more difficult question. There is considerable force to the view that federal law should generally be read as preempting (or not preempting) state law "cause[s] of action" rather than only particular remedies for their violation. Cf. *Davis* v. *Passman*, 442 U.S. 228, 239 (1979). Hence, the conclusion that federal law preempts Vermont nuisance law in the interstate pollution abatement context strongly suggests that, so too, respondents cannot seek a damage remedy under Vermont nuisance law. As this Court has recognized, however, preemption analysis may, in some circumstances, turn on the remedy being sought, particularly on the distinction between injunctive relief (including abatement) and money damages. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984). Although neither the courts below nor the parties focused directly on that possibility here, we believe such a distinction is appropriate to the extent that respondents seek compensatory damages.

Simply put, the principal factors that supported this Court's decision in *Milwaukee I* to oust the affected state's law and to fashion a federal common law of nuisance for interstate water pollution are not present in a case involving a private action for damages. *Milwaukee I* and the precedent on which it relied were all cases concerning the right of a state, as sovereign, to protect its natural environment from interstate pollution. Specifically, the cases all involved (and endorsed) the right of the affected state in its sovereign capacity to maintain an action under federal law to *abate* out-of-state pollution.[28] In each case, "quasi-sovereign" interests of the states in their respective natural environments were at stake, particularly the right of a state not to be forced to give up the quality of its natural environment "for pay." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).[29] Such sovereign rights are not at issue in a lawsuit, such as this one, in which private citizens seek money damages for harm caused to them by pollution originating out-of-state. See *id.* at 238 (remarking on "hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law").[30] In sum, to

[28] *Milwaukee I*, 406 U.S. at 104; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *New York* v. *New Jersey*, 256 U.S. 296 (1921); *New Jersey* v. *City of New York*, 283 U.S. 473, 476-477 (1931); *Missouri* v. *Illinois*, 200 U.S. 496 (1906); see also *Georgia* v. *Tennessee Copper Co.*, 237 U.S. 474 (1915); 237 U.S. 678 (1915); 240 U.S. 650 (1916).

[29] See, *e.g.*, *Milwaukee I*, 406 U.S. at 99, 104-105; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. at 237; *North Dakota* v. *Minnesota*, 263 U.S. 365, 373 (1923); *Oklahoma* v. *Cook*, 304 U.S. 387, 393 (1938); see also *Texas Industries, Inc.*, 451 U.S. at 641; *Milwaukee II*, 451 U.S. at 335 (Blackmun, J., dissenting); *Missouri* v. *Illinois*, 200 U.S. at 518.

[30] In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 n.17 (1981) this Court did not reach the question whether private parties could maintain an action for damages based on interstate water pollution under the federal common law of nuisance, having concluded that the federal common law of nuisance was itself preempted by the Clean Water Act. The Court did, however, note that the request went "considerably beyond" the cause of action recognized in *Milwaukee I* (453 U.S. at 10). In our view, the appropriateness of extending federal common law to a private damage action should depend on the nature of the interests providing the impetus for the applicability of federal common law in the first instance. Where those interests do not depend at all on the nature of the relief being sought (unlike here),

the extent that *Milwaukee I* may be considered to provide still-authoritative perspective for determination of the preemption question here, we do not believe the principle of that decision properly extends to preemption of a private action for compensatory damages.[31]

In all events, as we have explained (page 18 note 23, *supra*), the touchstone for preemption analysis here is the relevant congressional enactment, the Clean Water Act. That Act provides no sufficient basis for federal preemption of a private action for compensatory relief under the nuisance law of the affected state. Most fundamentally, the Clean Water Act provides a "comprehensive *regulatory* program" for the abatement of water pollution. *Milwaukee II*, 451 U.S. at 317 (emphasis added); *Train* v. *City of New York*, 420 U.S. 35, 37 (1975); see generally *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 2-3; *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 69-72 (1980); *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116-121 (1977). A comprehensive regulatory presence is not enough, however, to establish congressional intent to preempt related state damage remedies. For example, in *Silkwood* v.

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there would be no basis for a distinction. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 7 (finding federal common law damage action where "Indian relations * * * the exclusive province of federal law").

[31] While the Court in *Milwaukee I* tersely repudiated (406 U.S. at 102 n.3) the prior suggestion in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971), that an action for damages and injunctive relief could be brought under the affected state's common law, the only remedy at issue in *Milwaukee I* was abatement. *Wyandotte* itself was an action brought by a sovereign and not a private damage action. See also *Jackson* v. *Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) ("Clearly, if federal courts are to remain courts of limited powers * * * a dispute * * * cannot become 'interstate,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state.").

Kerr-McGee Corp., 464 U.S. 238 (1984), the Court unanimously agreed that while the federal government had unquestionably occupied the field of nuclear power safety regulation, the states remained free to provide compensatory remedies for those suffering radiation injuries. See *id.* at 256; *id.* at 263-264 (Blackmun, J., dissenting); *id.* at 275-276 (Powell, J., dissenting); cf. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205, 207-208, 216, 223 (1983) (state safety regulation of nuclear power preempted, but not traditional state economic regulatory authority).

Indeed, as we have explained (pages 14-15, *supra*), Congress completely refrained from addressing the issue of the availability of private damages for water pollution in the Clean Water Act. That would ordinarily indicate that Congress intended to preserve, rather than prohibit, any common law damage remedy for compensatory relief that might otherwise apply. See *Silkwood*, 464 U.S. at 263-264 n.7 (Blackmun, J., dissenting) ("The absence of federal regulation governing the compensation of victims * * * is strong evidence that Congress intended the matter to be left to the States."); cf. *Pacific Gas & Electric Co.*, 461 U.S. at 207-208. And, we perceive no basis in the statutory language or legislative history of the Clean Water Act for a different preemption rule in the interstate water pollution context. Unlike the abatement remedy, the interstate application of a compensatory damage remedy does not upset the partnership the Clean Water Act establishes between the federal government and the source state *to regulate* pollution. The discharger remains free to continue to act within applicable effluent limitations and standards, while paying for any actual injury that unreasonably results. The principal effect of the state law compensation remedy is economic: to require a discharger to bear a social cost of the discharge. To be sure, compensatory damages potentially may have an incidental regulatory effect. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-247

(1959).[32] Preemption of state law turns, however, on irreconcilable conflicts and not on incidental possibilities. See *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 299 (1976); see also *Local 296, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669, 676 (1983). An award of compensatory damages presents no such conflict so long as the measure of damages is confined to actual damages.

3. Respondents' claim for punitive damages (J.A. 33-34, 36), however, does not similarly survive preemption analysis. The primary purpose of punitive awards is to coerce the discharger into changing its behavior and, consequently, such awards are more akin in effect and design to an abatement remedy. See *Silkwood*, 464 U.S. at 263-265 (Blackmun, J., dissenting); see generally Prosser & Keeton, *The Law of Torts* 9 (5th ed. 1984) (footnote omitted) ("[Punitive] damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example."). Although in certain contexts, the additional regulatory effect may not call for a different preemption result from that reached for compensatory relief (see *Silkwood* v. *Kerr-McGee Corp.*, *supra*), a distinction is warranted here. As previously discussed, the Clean Water Act assigns the task of abatement exclusively to the federal government and the source state, while providing in a specifically limited fashion for accommodation of the interests of the affected state. Punitive damage awards, at the behest of the law of the affected state, would therefore frustrate the federal statutory scheme by changing the terms of the accommodation struck by Congress. Cf. *Electrical Workers*

[32] Because of the extent to which *Garmon* and its progeny have interpreted the federal labor law as intended to occupy the field (see, *e.g.*, 359 U.S. at 243), there is a more comprehensive basis for finding conflict with (and thus preemption of) state law in that field than is generally the case. The labor preemption cases, accordingly, do not provide appropriate guidance here.

v. *Foust*, 442 U.S. 42, 50-52 (1979). The power of one state unilaterally to apply its laws either itself or through lawsuits filed by its citizens to penalize discharges in another state is tantamount to the power to shut down the discharges entirely, regardless of the abatement levels established by the federal statutory scheme. See *Tennessee* v. *Champion International Paper Corp.*, No. 85-36-I (Tenn. Sup. Ct. filed Apr. 21, 1986) (application of civil penalties to out-of-state discharges preempted by Clean Water Act).[33] It follows, here, that punitive awards under Vermont nuisance law would conflict with the Clean Water Act and, like the Vermont abatement remedy previously discussed, should be preempted.[34]

This Court's decision in *Silkwood* does not call for a different result. There, punitive damages survived preemption because the legislative history of a relevant federal statute as well as pertinent federal agency regulations provided strong evidence that Congress intended that traditional remedies of "state tort law would apply *with full force unless they were expressly supplanted*" (464 U.S. at 255 (emphasis added)). The Court acknowledged that absent such evidence, preemption of punitive awards might be in order (*id.* at 250-251). There is no comparable evidence here of congressional acquiescence to the direct regulatory effect of the interstate imposition of punitive awards. To the contrary, the

[33] Recent experience has confirmed the unbounded reach of punitive awards. See generally Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 59 (1982). And courts have recognized the special problems posed by their imposition in cases involving multiple plaintiffs. See, *e.g.*, *Roginsky* v. *Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967) (Friendly, J.).

[34] The courts below virtually ignored respondents' request for punitive damages. The district court did not include a description of the claim in its summary of respondents' complaint (Pet. App. A6) and when discussing preemption twice referred to how "compensatory damage awards * * * merely *supplement* the standards and limitations imposed by the [Clean Water] Act" (*id. at* A17, A18 (emphasis in original)).

unilateral application of punitive awards across state boundaries would effectively redesign the regulatory scheme by overriding the secondary role Congress expressly assigned the affected states in the Clean Water Act. This case therefore falls within the Court's admonition in *Silkwood* that preemption of punitive damage awards is appropriate where such awards present "an irreconcilable conflict" with the federal statutory scheme or "frustrate any purpose of the federal remedial scheme" (464 U.S. at 256-257).

Finally, in contrast to the situation in *Silkwood*, other avenues are available to private plaintiffs for imposition of monetary penalties on the discharger for flagrant violations of the law. Under the Clean Water Act, a private citizen, not just the responsible federal agency, may ask a court to impose substantial civil penalties on a discharger that violates effluent standards and limitations the Act imposes. See 33 U.S.C. 1365(a), 1319(d) (up to $10,000 per day of violation).[35] In addition, because the Clean Water Act does not preempt at all the authority of the source state to impose more stringent requirements, citizens (such as respondents here) are always free to seek punitive awards under that state's law, should they be available—or even under the affected state's law, should the source state call for its application.

D. Applicable Choice Of Law Principles Will Determine Which State Law Governs In A Private Action For Compensatory Damages Based On Interstate Water Pollution

We are not unaware or unappreciative of the practical problems presented to an interstate discharger of water pollutants facing the prospect of private damage actions

[35] At the behest of a citizen suit, a court recently imposed a civil penalty of $1,285,000 on a discharger based on violations of the Clean Water Act. See *Chesapeake Bay Foundation* v. *Gwaltney*, 611 F. Supp. 1542 (E.D.Va. 1985), appeal pending, No. 85-1873 (4th Cir.).

for compensatory relief in more than one state and possibly under varying state laws. There is, however, no sound legal basis for the sweeping rules of federal preemption of state legislative jurisdiction and judicial authority IPC has advanced in this litigation—and, specifically, no basis for believing that Congress intended to supersede the longstanding and familiar feature of our jurisprudence that compensatory damages for tortious conduct are recoverable in the courts of the place of injury. IPC's concerns are, at bottom, not significantly different from those faced by any business enterprise that engages in substantial interstate commerce and is exposed to significant tort liability: the potential for unfavorable state law and unfavorable judicial forums. These concerns have not, without more, historically defeated the power of the courts either to hear claims for injuries occurring in their jurisdictions or to determine, in the event more than one state law is potentially available, which state law will govern. See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Young* v. *Masci*, 289 U.S. 253, 258-259 (1933). So long as the forum state satisfies applicable constitutional limitations (*e.g.*, due process, equal protection, and full faith and credit) both as to the exercise of its jurisdiction and its choice of law,[36] and Congress has not adopted a special rule for the occasion, this Court's role is limited. Since IPC can point neither to a specific congressional enactment nor to a particular constitutional provision to support its broad preemption claim, it must look to Congress, and not to this Court, for relief—if any relief is appropriate.

[36] See, *e.g.*, *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981); *Hughes* v. *Fetter*, 341 U.S. 609 (1951).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

HARMEL OUELLETTE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to this Court's Rule 42, Mid-America Legal Foundation ("*Mid-America*") hereby moves the Court for leave to file the attached brief as *amicus curiae* in support of petitioner.

Mid-America has an interest in the disposition of this case, which is before this Court on a writ of certiorari to the United States Court of Appeals for the Second Circuit. Mid-America participated as *amicus* in several cases that bear on the issue now before the Court including *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), and *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied sub nom. Scott* v. *City of Hammond*, 105 S.Ct. 979 (1985).

Mid-America was organized in 1975 to support the public interest in preserving the economic and political freedoms of our democratic society. The Foundation takes special interest in questions of law of a national scope that originate in or have a direct effect on the mid-America region, namely: Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the decision below interprets

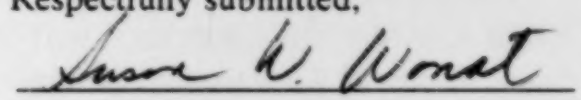
the "savings" clause of the Federal Water Pollution Control Act, Section 505(e), 33 U.S.C. § 1365(e), in a way which affects the interest of every state which shares a waterway with one or more states. By analogy, the implications of the decision extend beyond the question of interstate water pollution to include problems of air pollution and land use.

Mid-America respectfully submits that its brief, lodged herewith, presents at least one analysis of a significant question of federal law and related authority which is not adequately presented by the parties. It is the view of Mid-America that the Court of Appeals improperly construed the applicability of state common law remedies under the Federal Water Pollution Control Act in conflict with both the comprehensive federal statutory program for interstate water pollution control and with the decisions of this Court.

Mid-America has received the oral consent of petitioner, International Paper Company, and the written consent of respondent, State of Vermont. A copy of the written consent is being filed with the clerk. Consent was refused by counsel for respondents, Ouellette, *et al.*, necessitating this motion.

Mid-America respectfully urges this Court to grant this motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

HARMEL OUELLETTE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS*

The interest of Mid-America Legal Foundation as *amicus curiae* is set forth fully in the motion for leave to file which accompanies this brief.

SUMMARY OF ARGUMENT

In the Federal Water Pollution Control Act of 1972 ("*FWPCA*"), Sections 101-518, 33 U.S.C. §§ 466-1378 (1981), Congress created an integrated statutory scheme for water pollution abatement which accommodates state interests, but remains subject to federal supervision. The statute allocates substantial responsibility to the states for implementing specific programs, but it provides expressly for resolution of interstate water disputes through federally supervised procedures.

The "savings" clause of the FWPCA, Section 505(e), 33 U.S. § 1365(e), provides "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." The United States Court of Appeals for the Second Circuit erred when it construed this provision to allow property owners in Vermont to sue in Vermont courts and under the common law of that state an effluent producer located in New York. This construction undermines the legislative purpose of the FWPCA to ensure uniformity and finality in dealing with interstate water disputes by effectively subjecting dischargers to liability for state common law nuisance actions in any state which adjoins an interstate waterway. The decision of the Court of Appeals ignored well-established principles of statutory construction which require that a court interpret the individual provisions of a comprehensive statutory scheme to give effect to the legislative purpose of the entire act.

ARGUMENT

I. The Court of Appeals Erred When it Construed the Federal Water Pollution Control Act to Allow State Common Law Nuisance Suits to Be Brought in Any Court and Under the Law of Any State Where the Effect of a Discharge Occurs.

The United States Court of Appeals for the Second Circuit, adopting in most respects the opinion of the district court, held

that the FWPCA authorizes property owners in Vermont to sue, in Vermont courts and under the common law of the state, an effluent producer located in New York. Pet. Cert. App. at A-25, 602 F. Supp. at 274. This decision squarely conflicts with the legislative purpose and statutory scheme embodied in the FWPCA and with the decisions of this Court.

In the FWPCA, Congress created a federally supervised system of comprehensive plans for water pollution abatement through the integration of state and national standards. *See, e.g., Sierra Club* v. *Lynn,* 364 F. Supp. 834, 844 (W.D. Tex. 1973), *aff'd in part* and *rev'd in part on other grounds* at 502 F.2d 43 (1974). In furtherance of this scheme, Congress provided that states could adopt more stringent standards than the federally promulgated minimum requirements. If approved, however, the stricter state standards were incorporated as requirements of the federal permit. Section 510, 33 U.S.C. § 1370, Section 402, 33 U.S.C. § 1342.

Even while Congress expressly acknowledged its intent to "recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . . .", Section 101(b), 33 U.S.C. § 1251(b), it just as explicitly provided for resolution of interstate water pollution disputes through the federally supervised procedures set forth in the FWPCA. Section 401(a)(2), 33 U.S.C. § 1341(a)(2), Section 402(b)(3), (5), 33 U.S.C. § 1342(b)(3), (5). Thus, the FWPCA did not create two independent systems of water pollution control, but a single integrated scheme. This scheme accommodates state interests, but remains subject to federal supervision.

Anticipating that resolution of interstate disputes in the context of the FWPCA was a potential source of difficulty, Congress expressly tackled this concern by providing detailed procedures for resolving disputes concerning discharges that affect another state. Section 402(b)(3) of the FWPCA, 33

U.S.C. § 1342(b)(3), requires that any state "whose waters may be affected" by the issuance of a discharge permit shall receive notice of the permit application and an opportunity for public hearing before a permit is granted. Section 402(b)(5), 33 U.S.C. § 1342(b)(5), then allows the affected state to submit written objections, including their own more stringent standards, to the permitting state and the Administrator or USEPA or another federal agency. Section 401(a)(1), (2), 33 U.S.C. § 1341(a)(1),(2), Section 402(a)(3), § 1342(a)(3). These separate provisions, envisioning a comprehensive scheme of federal and state regulations, clearly were enacted to complement one another in providing an efficient and fair system for controlling pollution in our waterways.

The "savings" clause, Section 505(e), 33 U.S. §1365(e), which is the focal point of the issue before this Court, provides "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." The decision of the U.S. Court of Appeals for the Second Circuit frustrates the basic purpose of the FWPCA by construing this section in a way which undermines the other provisions of the statute that are designed to ensure uniformity and finality in dealing with interstate water disputes.

Choice of law considerations resulting from this construction would generate uncertainty about the discharge requirements that must be met to protect against state common law nuisance suits. This problem would be compounded where more than two states border a waterway. Under these circumstances, dischargers in one state may be subject to state common law nuisance suits in every jurisdiction which is affected by the discharge.

Clearly, the FWPCA establishes a comprehensive federal system for interstate water pollution control that is based on federal/state cooperation. There is no question that Congress intended that the states retain primary responsibility for the

control and elimination of water pollution within their boundaries. This responsibility is to be exercised, however, as a complement to the uniform federal system and not in derogation of it.

II. Principles of Statutory Construction Require that Individual Provisions of a Comprehensive Statutory Scheme Should be Construed to Give Effect to the Legislative Purpose of The Entire Act.

The courts below erred when they gave the broadest possible construction to the "savings" clause of the FWPCA at the expense of furthering the legislative goals of the entire act. In a case of statutory construction, courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and its object and policy." *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975). The court's objective in a case such as this is "to ascertain the congressional intent and give effect to the legislative will." *Id.* at 707. The *Philbrook* case involved the interpretation of both a federal statute and a state regulation dealing with aid to Families with Dependent Children ("*AFDC*"). This Court construed the federal statutory provision to mean that the actual payment of, rather than mere eligibility for, unemployment compensation would be a disqualifying factor for AFDC benefits. The state regulation, which could have been applied to exclude unemployed fathers who are merely eligible for unemployment compensation, was held to impermissibly conflict with the federal provision. After studying the legislative history of the AFDC program of the Social Security Act, this Court concluded that an interpretation of either the federal statute or the state regulation which would exclude children of parents who were merely eligible for unemployment compensation would not serve the purposes of the program.

Furthermore, the *Philbrook* Court did not want an individual state to be able to change the definition of an "unemployed

father." "An important purpose of the 1968 amendments was to eliminate the variation in state definitions of unemployment . . . and Congress twice turned back attempts by the Senate to restore to States discretion in the coverage of the program." *Id.* at 719. To allow widely varying rulings among states on such an issue, the court reasoned, would be inconsistent with Congress' intent. *Id.* at 710 n.6. Thus, in the administration of a nationwide program such as AFDC, this Court already has reiterated the importance of harmony between state regulations and the objectives and policy of a federal program.

These are precisely the same factors which the Seventh Circuit found so critical in *Illinois* v. *City of Milwaukee,* 731 F.2d 403 (7th Cir. 1984), *cert. denied sub nom. Scott* v. *City of Hammond,* 105 S.Ct. 979 (1985) ("*Milwaukee III*"), but which the U.S. Court of Appeals for the Second Circuit, in the instant case, all but ignored. The *Milwaukee III* decision, which involved issues similar to those now before the Court, held that the "savings" clause of the FWPCA should be construed to preserve only state common law nuisance actions in a state where the discharge occurs. Citing *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), ("*Milwaukee I*"), *City of Milwaukee* v. *Illinois,* 451 U.S. 304 (1981), ("*Milwaukee II*"), and *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938), the Seventh Circuit noted that "the claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing users." 731 F.2d at 410-11.

Within this context the *Milwaukee III* court found it "implausible that Congress meant to confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statute or common law of State II." 731 F.2d at 414. Such a construction would undermine the "uniformity and state cooperation envisioned by the Act." *Id.*

Furthermore, it is an elementary canon of construction that a statute "should be interpreted so as not to render one part inoperative." *Mountain States Telephone and Telegraph Co.* v. *Santa Ana,* 427 U.S. ____, 105 S.Ct. 2587 (1985); *Colautti* v. *Franklin,* 439 U.S. 379, 392 (1979). The *Mountain States* case involved the validity of a 1928 purchase of an easement by the telephone company from the Indians of Santa Ana, New Mexico. The company contended that the purchase of this easement was valid under § 17 of the Pueblo Lands Act of 1924 because it was "first approved by the Secretary of the Interior." The Pueblo Indians, however, argued that the easement was never valid because § 17 only authorizes such transfers "and as may hereafter be provided by Congress" and that Congress never passed such legislation.

Although conceding that both of these constructions found "some support in the language of § 17", this Court ruled that the telephone company's interpretation of § 17 better harmonized "with the structure of the entire Act and with its contemporary legal context." *Id.* at 2596. In so ruling, this Court was mindful not only of this particular conveyance, but of numerous others in the years following the enactment of the Pueblo Lands Act of 1924. *Id.* at 2597. In sum then, this Court was striving for a common sense interpretation which would clear up any ambiguities in the law and provide a clear and uniform guideline for future courts.

Likewise, in the instant case, this Court should reconcile the different parts of the FWPCA to give them a meaning in harmony with each other. If the opinion below is allowed to stand, it will render meaningless those parts of the statute envisioning a comprehensive and uniform scheme for pollution control of interstate waterways.

In his treatise on statutory construction, Francis J. McCaffrey notes that "in all cases, provisos, exceptions and savings clauses should be read according to the apparent intent of the Legislature (with respect to purpose of statute)." Francis

J. McCaffrey, *Statutory Construction* § 62 (1953). In fact, McCaffrey suggests that a "general savings act will not be held to apply where it is evident that the effect of its application would be to defeat the manifest purpose of the Legislature in the statute as a whole." *Id.* at § 62.

Clearly, the courts below were in error when, ignoring settled principles of statutory construction, they construed the "savings" clause in a way which frustrates the purpose of the FWPCA.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Second Circuit

BRIEF OF THE STATE OF TENNESSEE AND TWELVE ADDITIONAL STATES AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF OF THE STATE OF TENNESSEE AND TWELVE ADDITIONAL STATES AS AMICI CURIAE SUPPORTING RESPONDENTS

THE INTEREST OF THE AMICI CURIAE

The amici curiae are the sovereign States of Tennessee, California, Connecticut, Idaho, Illinois, Iowa, Missouri, Nebraska, Oklahoma, Rhode Island, South Carolina, South Dakoka, and Virginia, which file this Brief by and through their respective Attorneys General pursuant to Rule 36.4 of the Rules of the Supreme Court. Each of the *amici* states, in the exercise of their reserved police power, have enacted legislation respect-

ing the protection of the environment for the furtherance of the public health, safety, and welfare.[1]

The Court of Appeals below, in *Ouellette v. International Paper Company*, 776 F.2d 55 (2d Cir. 1985), *aff'g Ouellette v. International Paper Company*, 602 F.Supp. 264 (D. Vt. 1985) ("*Ouellette*"), correctly ruled that the Federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), authorizes resort to the common law of the state where injury from interstate water pollution occurs. The Seventh Circuit Court of Appeals, however, by holding in *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984) ("City of Milwaukee"), *cert. denied sub nom. Scott v. City of Hammond*, 469 U.S. ____, 105 S.Ct. 979 (1985), that the CWA preempts the application of the law of the state where the injury occurred to out-of-state sources of pollution,[2] has raided the treasury of power reserved to the states.[3]

---

[1] Particularly pertinent are those laws by which the *amici* states seek to protect, preserve, and enhance the quality of their waters. *See, e.g.*, the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-101 *et seq.* As stated in T.C.A. § 69-3-102(a):

> [I]t is declared to be the public policy of Tennessee that the people of Tennessee...have a right to unpolluted waters. In the exercise of its public trust over the waters of the state, the government of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right.

Further, pursuant to T.C.A. § 69-3-114(a), causing pollution is declared to be a public nuisance, subjecting the violator to actions for civil penalties, T.C.A. § 69-3-115(a), injunctive relief, T.C.A. § 69-3-117, and, in appropriate cases, criminal sanctions and fines. T.C.A. § 69-3-115(b) and (c).

[2] The Tennessee Supreme Court recently adopted the view of the Seventh Circuit in *State v. Champion International Corp.*, ____ S.W.2d ____, *reported at* 24 Env't.Rep.Cas. (BNA) 1371 (Tenn. 1986) ("Champion"). The State of Tennessee will shortly file a Petition for Certiorari with this Court seeking review of the Tennessee Supreme Court's decision and requesting consolidation with these proceedings.

[3] U.S. Const. amend. X.

The *amici* states have experienced, are experiencing, or are subject to interstate water pollution problems. The resolution of this issue, upon which two Federal Circuit Courts of Appeals are divided, will materially affect the ability of the *amici* states to exercise their inherent police power to protect the water resources and health, safety, and welfare of the people of their states.

For example, Tennessee, which is bordered by eight other states and traversed by numerous interstate rivers and streams, found it necessary to bring suit under Tennessee law in the Tennessee state courts against an out-of-state polluter of its waters.[4] That suit involved the gross and continuing pollution of the Pigeon River, an interstate stream flowing from North Carolina into Tennessee, by the defendant owner and operator of a papermill located in North Carolina a short distance across the state border. The Pigeon River is a premier trout and bass stream in North Carolina above the defendant's papermill. However, the defendant's effluent has turned the Tennessee portion of the Pigeon River into a murky, odorous stream which supports only minimal aquatic life.

The Tennessee Court of Appeals declined to follow the Seventh Circuit Court of Appeals' *City of Milwaukee* decision and held that the CWA *does not* preempt the application of Tennessee's water pollution and nuisance laws to an out-of-state polluter.[5] A divided Tennessee Supreme Court, however, recently reversed the Tennessee Court of Appeals' decision and dismissed the *Champion* suit, holding that the CWA had preempted the application of Tennessee's water pollution and nuisance law to an out-of-state polluter.[6]

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[4] *State v. Champion International Corp.*, No. 83-1149-I (Tenn. Ch. Ct., filed July 8, 1983).

[5] *See State v. Champion International Corp.*, ____ S.W.2d ____, *reported at* 22 Env't Rep. Cas. (BNA) 1338 (Tenn. App. 1985) ("Champion").

[6] *See* note 2, *supra.*

SUMMARY OF ARGUMENT

The *amici* argue that the *Ouellette* Court reached the correct result in holding that the CWA allows the application of the law of the state where injury from out-of-state pollution occurred, but submit a different rationale from that adopted by the Second Circuit.[7] The *amici* contend that: **(1)** Prior to *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972) ("*Milwaukee I*"), and the federal common law which was thereby created, there was no bar to the application of state law to control interstate water pollution and this Court in *Milwaukee I did not* irreversibly erase this inherent state power *but* merely superseded it; **(2)** This Court, in *City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304 (1981) ("*Milwaukee II*"), found that the CWA preempted federal common law but *did not* decide that state law was similarly preempted; **(3)** Upon the demise of federal common law pursuant to *Milwaukee II,* the disability previously imposed by the federal common law upon the states' inherent police power dissipated, *unless* the CWA itself preempts state law; **(4)** There is no indication in the CWA that Congress intended to preempt state law; indeed, the CWA expressly preserves such state law.

[7] The rationale argued by the *amici* is essentially that adopted by the Tennessee Court of Appeals in *Champion, supra.*

ARGUMENT

I. The Federal Clean Water Act Has Not Preempted The Application Of State Law Relative To Injury Caused By Out-Of-State Water Pollution Discharges.

In determining whether the CWA preempts state law relative to interstate water pollution, three fundamental principles must be kept in mind. In the first instance, there is no doubt that the states have the power to prevent the pollution of their waters.[8] This power is preserved by the Tenth Amendment to the U.S. Constitution.[9] Second, federal preemption of this power will take place only if intended by Congress. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Third, in those instances where the National and state governments exercise concurrent power, such as in the regulation of water pollution, the Supremacy Clause[10] will act to preempt state laws only if there is an irreconcilable conflict between the two, as when " 'compliance with both federal and state regulations is a physical impossibility....' " *Hillsboro County, Fla. v. Automated Med. Laboratories, Inc., supra,* 471 U.S. at ____, 105 S.Ct. at 2375.

[8] In *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 498 n. 3 (1971), the basic principle recognized was that the states have inherent power to police the pollution of their waters, in the absence of a preemptive body of federal law. *See also Hillsboro County, Fla. v. Automated Med. Laboratories, Inc.,* 471 U.S. ____, ____, 105 S.Ct. 2371, 2378 (1985) (Noting that "the regulation of health and safety matters is primarily, and historically, a matter of local concern."); Glicksman, *Federal Preemption and Private Legal Remedies for Pollution,* 134 U.Pa.L.Rev. 121, 153, 204 & 207-08 (1985) (hereinafter Glicksman, *Federal Preemption*) (Noting this Court's recognition of the "quasi-sovereign" right of each state to protect its natural resources and environment from degradation from outside sources).

[9] The National government is one of enumerated powers. The reserved law-making powers of the states, however, do not derive from or depend for their existence upon, the Constitution of the United States. At least so far as that Constitution is concerned, they are inherent. *See* U.S. Const. amend. X; *United States v. Darby,* 312 U.S. 100, 124 (1941).

[10] U.S. Const. Art. VI, § 2.

As was correctly observed by the Tennessee Court of Appeals in *Champion, supra*, 25 ERC at 1340:

> 'Proper respect, therefore, for the independent sovereignty of the several States requires that federal supremacy be invoked only where it is clear that Congress so intended. Statutes should therefore be construed to avoid preemption, absent an unmistakable indication to the contrary'. *Penn Terra Ltd. v. Department of Environmental Resources,* 733 F.2d 267, 273 (3rd Cir. 1984). 'We start with the basic assumption that Congress did not intend to displace state law. Where it is argued that Congress intended to withdraw police power from a state, that intention must be unmistakable'. *Matter of Quanta Resources Corp.,* 739 F.2d 912, 916 (3rd Cir. 1984) [, *aff'd sub nom. Midlantic National Bank v. New Jersey Dept. of Environmental Protection,* 474 U.S. ____, 106 S.Ct. 755 (1986)]; *see Penn Terra Ltd.,* 733 F.2d at 272-273. There is a 'presumption against preemption'. *Matter of Oswego Barge Corp.,* 664 F.2d 327, 335 (2nd Cir. 1981).

Further, where Congress intends to preempt state law, it usually says so in affirmative, clear, and explicit terms.[11] And, where Congress has not clearly stated that state law is preempted, state law is preserved "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States". *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978). In addition, "if we are left with a doubt as to congressional purpose, we should be slow to find preemption, '[f]or the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.' "

[11] *See, e.g.,* 7 U.S.C. § 228c (Federal Packers and Stockyards Act); 15 U.S.C. § 755(b) (Emergency Petroleum Allocation Act of 1973); 15 U.S.C. § 2617 (Toxic Substances Control Act); 17 U.S.C. § 301 (Federal Copyright Act).

Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984), *cert. denied sub nom. Chevron U.S.A., Inc. v. Sheffield,* 472 U.S. ____, 105 S.Ct. 2686 (1985) (Alaska Stat. § 46.03.750(e), prohibiting oil tanker ballast discharges into Alaskan waters, was not preempted by Title II of the Ports and Waterways Safety Act of 1972, as amended by the Ports and Tanker Safety Act of 1978, 46 U.S.C. § 391a).[12]

The *amici* fail to discern any "clear and manifest" intent of Congress in the CWA to preempt state laws in the context of interstate pollution or otherwise.[13] Indeed, Congress in 33 U.S.C. § 1251(b) expressed its intent "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution...."[14] Toward this end, 33

[12] *See generally,* Glicksman, *Federal Preemption, supra* note 8, at 183-85 & 191-92.

[13] In Glicksman, *Federal Preemption, supra* note 8, at 138-39, 195-213 & 223, the author contends that four values — legitimacy, individual liberty, accommodation, and efficiency — are reflected either in the CWA and other federal pollution control legislation or the Constitution and are values which Congress and the courts have considered in deciding whether private remedies for pollution have been preempted. The author concludes that "State common-law actions for interstate pollution are...supported by a consideration of the four values." *Id.* at 138.

The author further concludes that "Congress did not preempt state common-law remedies for harms by expressly occupying the field of interstate pollution through the enactment of the Clean Air and Water Acts," *id.* at 197, nor has it implicitly done so. *Id.* at 198-210. *See also Stoddard v. Western Carolina Regional Sewer Auth.,* 784 F.2d 1200, 1207 (4th Cir. 1986) ("We see nothing in the Clean Water Act that presages a congressional intent to occupy the entire field of water pollution to the exclusion of state regulation."); *Ouellette, supra,* 602 F.Supp. at 269 ("[T]here is simply nothing in the Act which suggests that Congress intended to impose...limitations on the use of state law" in the interstate pollution context.).

[14] This is "Congress' express policy" in spite of "extensive federal oversight...." *Ouellette, supra,* 602 F.Supp. at 268.

U.S.C. § 1370(1) states that nothing in the CWA precludes or denies the rights of any state to adopt or enforce *not only* "(A) any standard or limitation respecting discharge of pollutants", *but also* "(B) any requirement respecting control or abatement of pollution...." (Emphasis added).

In addition, 33 U.S.C. § 1370(2) states that the CWA shall not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." The only possible meaning of § 1370(2) is that Congress intended to authorize the States to police the pollution of their boundary waters except when Congress "expressly" provided otherwise in the Act.[15] No other meaning can be ascribed to § 1370(2) if the statute is to be construed in light of the CWA's underlying policies, one of which is expressly stated in 33 U.S.C. § 1251(b) to preserve the inherent police powers of the states to prevent pollution.[16]

II. The *City of Milwaukee* Decision Of The Seventh Circuit Court Of Appeals Applied The Wrong Analysis And Therefore Reached An Erroneous Conclusion That The CWA Preempts State Regulation Of Interstate Water Pollution.

The petitioner, understandably, relies heavily on the decision of the Seventh Circuit Court of Appeals in *City of Milwaukee*.

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[15] The *Ouellette* Court, 602 F.Supp. at 268, also relied upon 33 U.S.C. § 1365(e), which provides that "[n]othing in this section shall restrict any right which any person...may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." *See also Champion, supra,* 22 ERC at 1342; Glicksman, *Federal Preemption, supra* note 8, at 186-87, 197.

[16] Since the water quality protection laws of the *amici* and the CWA have the same goals — the prevention and elimination of water pollution — this Court "should be reluctant to infer preemption. '[I]t would be particularly inappropriate...because the basic purposes of the state statute and the [federal] Act are similar.'" *Chevron, U.S.A., Inc. v. Hammond, supra,* 726 F.2d at 497.

There the Seventh Circuit ruled that the CWA preempted state law relative to regulation of out-of-state sources of pollution. That case and its erroneous holding can best be properly understood in its historical context, which involves a tortuous path of litigation spanning well over a decade.

A. *Milwaukee I*

Illinois first brought suit against the City of Milwaukee in the United States Supreme Court in 1971, invoking the "original jurisdiction" of the Supreme Court by claiming that Milwaukee was an instrumentality of the State of Wisconsin and thus, its action was one against the State of Wisconsin. *Milwaukee I,* 406 U.S. 91 (1972). At the time the suit was filed and, indeed, continuing to the present day, the City of Milwaukee was and is daily discharging thousands of gallons of untreated raw sewage into Lake Michigan and subsequently polluting the waters of Illinois. This Court declined to entertain the suit, holding that the City of Milwaukee was not a state for purposes of invoking the Court's original jurisdiction. However, the Court ruled that the City of Milwaukee could be sued in an appropriate United States District Court and created a body of federal common law to abate such a public nuisance.

The Court took the unusual step of establishing a federal common law remedy for several reasons. First, it found that the pollution of interstate waters is a legitimate federal concern. 406 U.S. at 101. Second, it found that Congress had not fully addressed in a comprehensive manner the question of interstate water pollution. Therefore, the Court felt free to create a common law remedy in the federal courts. 406 U.S. at 107. Actions to be brought thereunder were characterized as "equity suits in which the informed judgment of the Chancellor will largely govern." *Id.* The Court was careful to note, however, that future action by Congress in the field of interstate water pollution could very well abrogate the newly-created federal common law remedy. *Id.*

Though not an issue in *Milwaukee I,* and thus not decided by the Court directly, it is generally recognized that the federal common law created by the Court preempted state statutory and common law remedies otherwise applicable to interstate pollution. 406 U.S. at 107, n. 9; *Milwaukee II,* 451 U.S. at 326. Even so, the Supreme Court in *Milwaukee I* did not effect an *irreversible* displacement of state law; nor did it somehow erase state law out of existence simply by adopting a preemptive federal common law. Even when preempted by federal common or statutory law, the police power of the states to act in the field continues to *exist*. If and when the National government retires from the field, the disability that the Supremacy Clause imposes on the exercise of the inherent police powers of the states dissipates.[17]

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[17] As long ago as *Sturges v. Crowninshield,* 4 Wheat (17 U.S.) 122 (1819), it was argued that the enactment of a national bankruptcy law which preempted state bankruptcy laws thereby permanently extinguished the power of the states in that field, even after the repeal of the federal statute. Mr. Chief Justice Marshall rejected that argument, writing:

> It has been said that Congress has exercised [its bankruptcy] power, and, by doing so, has extinguised the power of the states, which cannot be revived by repealing the law of Congress.
>
> We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of Congress.

Id. at 196. *See also Chicago & N.W.R.R. Co. v. Fuller,* 84 U.S. 560, 568 (1873).

If Congress has no power to permanently and irreversibly displace state law, the Supreme Court surely cannot do so simply by choosing to create federal common law. Whatever preemptive effect *Milwaukee I* had on state law dissipated upon the demise of federal common law resulting from this Court's decision in *Milwaukee II,*

B. *Milwaukee II*

Illinois then proceeded to file suit against the City of Milwaukee in the United States District Court for the Northern District of Illinois, under a theory of federal common law nuisance. It also sought relief under two pendant state law claims and one at common law. Five months later, Congress enacted significant amendments to the Federal Clean Water Act, fashioning the law much as it stands today. Both the Federal District Court[18] and the Seventh Circuit[19] ruled in favor of Illinois under a theory of common law nuisance and ordered the City of Milwaukee to take corrective measures to abate the pollution. Both Courts rejected the argument of the City of Milwaukee that the extensive 1972 amendments to the Clean Water Act had obviated federal common law in the area of interstate control of water pollution. The City of Milwaukee appealed to this Court.

In *Milwaukee II,* this Court, on the second occasion that it had the case, reversed the Seventh Circuit Court of Appeals. The Court held that the 1972 Clean Water Act Amendments exhibited an intent on the part of Congress to obviate the *federal* common law in this area. Therefore, with respect to a *federal* remedy regarding interstate water pollution, the amended CWA was an agrieved party's sole recourse. The federal common law actions created by *Milwaukee I* were no longer available.

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discussed *infra.* And, unless the CWA *itself* preempts the application of state law, the *amici* cannot be disabled from policing the pollution of their boundary waters.

[18] *Illinois v. City of Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973).

[19] *Illinois v. City of Milwaukee,* 599 F.2d 151 (7th Cir. 1979).

As to the validity of Illinois' pendant state law claims, the Court specifically declined to rule on them. 451 U.S. at 310 n.4. The Court emphasized that its decision in finding preemption of *federal* common law was based *solely* on considerations respecting the separation of powers between the legislative and judicial branches of the *National* government. Thus, as the Fourth Circuit Court of Appeals recently noted, "*Milwaukee II* decided whether the Act left room for federal common law, 'not whether that law pre-empts state law.' " *Stoddard v. Western Carolina Reg. Sewer Auth., supra,* 784 F.2d 1207 n. 9. The quite *different* considerations respecting the division of powers between the National government and the states and whether the CWA preempted state law *did not* come into play. *See* 451 U.S. at 316-17 & n. 9. The Court was careful to emphasize that "the comprehensive character of a federal statute" is "an insufficient basis to find preemption of state law" and, indeed, is not even "relevant" to the question whether *state* law can be concurrently applied. *Id.* at 319 n. 14.[20] *See also Hillsboro County, Fla. v. Automated Med. Laboratories, Inc., supra,* 471 U.S. at ____, 105 S.Ct. at 2377.

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[20] The case of *Askew v. American Waterways Operators, Inc.,* 411 U.S. 332 (1973), is illustrative of this principle. That case involved, in part, the question of whether the Florida Oil Spill Prevention and Pollution Control Act, Fla. Stat. Ann. § 376.011 *et seq.*, was preempted by the Federal Water Quality Improvement Act, 33 U.S.C. § 1161 *et seq.* Although noting that "The Federal Act, to be sure, contains a pervasive system of federal control over discharges of oil" into navigable waters, 411 U.S. at 330, the Court nevertheless found the State Act not in conflict with the federal scheme and thus not preempted.

In a similar vein, this Court recently rejected the argument that the regulation of blood plasma under § 351(a) of the Public Health Service Act, 42 U.S.C. § 262(a), although "a subject of national concern", was not "an area of overriding national concern" so that preemption of local ordinances and regulations would be inferred. *Hillsboro County, Fla. v. Automated Med. Laboratories, Inc., supra,* 471 U.S. at ____, 105 S.Ct. at 2378. *See also Chevron U.S.A., Inc. v. Hammond, supra,* 726 F.2d at 491-92.

C. *City of Milwaukee*

The case then went back to the Seventh Circuit. On remand, the Seventh Circuit was left with addressing the alternative state law theory of recovery asserted in the District Court by the State of Illinois, which issue had been left undecided by this Court.[21] Illinois had invoked the pendant jurisdiction of the Court and argued in the alternative that Milwaukee was subject to Illinois state statutory and common laws prohibiting water pollution. The Seventh Circuit disagreed, ruling that just as the *federal common law* created by *Milwaukee I* was the exclusive remedy to abate interstate pollution prior to the 1972 CWA Amendments, the federal *statutory* (CWA) scheme is now the exclusive remedy.

The Seventh Circuit grounded its finding of preemption on its reading of *Milwaukee I* and *Milwaukee II:*

> The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the State claiming injury cannot apply its own state law to out-of-state discharges now. *Milwaukee II* did nothing to undermine that result. The claimed pollution of interstate

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[21] It decided several other cases as well. In a related case, the Federal District Court for the Northern District of Illinois had decided the question of whether the CWA had preempted state law in two decisions with opposite results. In *Scott v. City of Hammond,* 519 F.Supp. 292, 298 (N.D. Ill. 1981), Judge Crowley of that Court ruled that there was "no doubt that the [CWA] does not preempt states from enforcing stricter controls than the Federal government on in-state polluters". Following this decision, Judge Crowley resigned and Judge Shadur of that Court, to whom the *Scott* case had been reassigned, and unaware of the prior decision, *see Illinos v. Lever Bros.,* 530 F.Supp. 293, 294 (N.D. Ill. 1981), ruled to the contrary in *Chicago Park Dist. v. Sanitary Dist. of Hammond,* 530 F.Supp. 291 (N.D. Ill. 1981). The appeal of those cases was consolidated with the remand of *Milwaukee II* to the Seventh Circuit.

> waters is a problem of uniquely federal dimensions requiring the application of federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing states. Given the logic of *Milwaukee I* and *Milwaukee II*, we think federal law must govern in this situation except to the extent that the 1982 FWPCA (the governing federal law created by Congress) authorizes resort to state law.

731 F.2d at 410-411.

The logic of the Seventh Circuit is tempting, but nevertheless wrong. It starts from the arguable premise that the federal common law remedies created by *Milwaukee I* preempted or put a lid on all state law remedies to control interstate water pollution.[22] Under the Seventh Circuit's reasoning, since *Milwaukee II* displaced the judicially-created federal common law, it automatically became the new lid preventing resort to state law remedies. According to the Seventh Circuit, this is so because the "very reasons" for adopting a *preempting federal common law* dictate a *preempting federal statute*.

Here lies the pivotal error in the Seventh Circuit's rationale. The *Supreme Court's* reasons for adopting a federal common law rule cannot be imputed to the *United States Congress* when it abrogates that rule and replaces it with a statute. To determine the intent of Congress under the CWA, one must look to

[22] The District Court's rationale in *Ouellette, supra*, also erroneously appears to accept that this Court's decision in *Milwaukee I* irrevokably preempted state law in the area, with the result that the "controlling question" is the extent to which 33 U.S.C. 1365(e) and 1370 authorize resort to state law. 602 F.Supp. at 268. The *Ouellette* Court correctly concluded, however, "that the Act authorizes actions to redress injury caused by water pollution of interstate water through the laws of the state in which the injury occurred." *Id.* at 269.

the Act itself,[23] *not* policy considerations involved in this Court's creation of a federal common law remedy.[24] "Before the Supreme Court finds that state law has been preempted, however, a clear and manifest congressional purpose must be found, and the Court's analysis includes due regard for the concepts of federalism." *Stoddard v. Western Carolina Reg. Sewer Auth., supra,* 784 F.2d at 1207, *citing Milwaukee II,* 451 U.S. at 316-17, and *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). Had the Seventh Circuit confined its inquiry to the CWA and the congressional intent expressed therein, it should have arrived at a different conclusion.

Furthermore, the Seventh Circuit's attempt to explain away two key provisions of the CWA is far from convincing. As noted above, 33 U.S.C. § 1370(2) provides that the CWA shall not be construed as impairing "any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." As the Court in *Bass River Associates v. Mayor, Township Commissioner,* 743 F.2d 159, 165 (3rd Cir. 1984), noted, this section "clearly shows Congress' intent *not* to preempt state anti-pollution efforts." The Seventh Circuit dismissed the clear meaning of this provision by simply concluding that "Congress intended no more than to save the right and jurisdiction of a state to regulate activity occurring *within the confines* of its boundary waters." *City of Milwaukee, supra,* 773 F.2d at 413. The Court likewise held that 33 U.S.C. § 1365(e), which provides that nothing in § 1365 restricts *any* right of relief under *any* statute or common law, preserves only "a statute or common law of the state in which the discharge occurs". 731 F.2d at 414. The Tennessee Court of Appeals

[23] When Congress' intent controls, the statutory text must be the first source consulted. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979).

[24] *See Champion, supra,* 22 ERC at 1341.

characterized this as a "strained reading" of these two provisions. *Champion, supra,* 22 ERC at 1342.[25]

The Seventh Circuit's construction of § 1365(e) and § 1370 seems to have its foundation more in a skewered policy judgment than in the plain meaning of the CWA when it suggests, 731 F.2d at 413-14, that discharges might be forced to meet standards more stringent than those established by the permit-issuing state. That, however, the *amici* argue, is precisely the regulatory scheme that is envisioned and permitted by the CWA. To borrow from language of this Court in another context, though applicable here, "The federal interest at stake here is to ensure minimum standards, not uniform standards." *Hillsboro County, Fla. v. Automated Med. Laboratories, Inc., supra,* 471 U.S. at ____, 105 S.Ct. at 2380 n. 5 (1985).[26] Certainly, polluters should not be immunized from violations of state water quality laws and regulations simply because their industrial plant happens to be conveniently located on the other side of a state boundary.[27]

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[25] *See also* note 15, *supra.*

[26] Indeed, as the Court in *Chevron, U.S.A., Inc. v. Hammond, supra,* 726 F.2d at 491, stated, "Congress has indicated emphatically that there is no compelling need for uniformity in the regulation of pollutant discharges — and that there is a positive value in encouraging the development of local pollution control standards stricter than the federal minimums". Further, "there is no...dominant national interest in uniformity in the area of coastal environmental regulation". *Id.* at 492. As Mr. Justice Drowota, dissenting in *Champion, supra,* 24 ERC at 1378, noted, "Nothing I have found in the FWPCA reveals a Congressional intent to establish uniform standards...." Further, "unwavering conformity to purposeless uniformity does not serve the interests of federalism or of the Commerce Clause". *Id. See also* Glicksman, *Federal Preemption, supra* note 8, at 189, 200, 208, 212-13.

[27] The Seventh Circuit likewise misses the mark when it suggests that in the context of interstate water pollution "[t]he issue is in fact 'dividing the pie,' *i.e.,* the equitable reconciliation of competing uses of an interstate body of water...." *City of Milwaukee, supra,* 731 F.2d at 410. Rather, the *amici* assert, the issue is, in fact, the elimination of pollution from the nation's navigable waters, which Congress has established as the goal of the CWA. *See* 33 U.S.C. § 1251(a)(1); *Milwaukee II, supra,* 451 U.S. at 318 ("The 'major purpose' of the [1972] Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.' ").

Contrary to the Court of Appeals' suggestion that the CWA § 402, 33 U.S.C. § 1342, permitting process "seems now to be the appropriate federal forum for adjusting the competing claims of states in the environmental quality of interstate waters," 731 F.2d at 412 n. 5, the mere *availability* of the § 402 administrative process is no indication that Congress intended to *displace* any other jurisdiction or remedy of the states.[28] The process provided by § 402 for an affected state to challenge the issuance of an NPDES permit by the issuing state is exceedingly cumbersome and simply does not provide an adequate remedy for the amelioration of interstate water pollution.[29] Indeed, it is at best unclear whether a refusal by the Environmental Protection Agency to veto an issuing state's NPDES permit can be challenged in any federal court by the affected state,[30] leaving

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[28] Indeed, 33 U.S.C. §§ 1251(b), 1365(e), and 1370 indicate the contrary.

[29] *See* Glicksman, *Federal Preemption, supra* note 8, at 166-67 ("It is not clear...that the Clean Water Act provides adequate means for a state to protect its resources from impairment by another state or its citizens.") *See also id.* at 198-199, 205-06.

[30] The Court of Appeals noted this uncertainty in *Illinois v. City of Milwaukee,* 599 F.2d 151, 160 & n. 17 & 18 (7th Cir. 1979). This Court has not decided the issue, merely stating in *Crown Simpson Pulp Co. v. Costle,* 445 U.S. 193, 197 n. 9 (1980) (emphasis added), that such a failure to veto would "not necessarily" constitute reviewable EPA action. *See Kitlutsisti v. Arco Alaska, Inc.,* 592 F.Supp. 832, 841 n. 6 (D. Alaska 1984) ("The Supreme Court... indicated that...the EPA's failure to object to such permit may not be [subject to judicial review].").

Several cases have held there to be no review available in either the Courts of Appeals, *District of Columbia v. Schramm,* 631 F.2d 854,

those harmed in the affected state completely to the unfettered mercy of state and federal administrative authorities.

CONCLUSION

For the reasons stated above, the *amici* respectfully urge the Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

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861 (D.C. Cir. 1980); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1290-91 (5th Cir. 1977); *Mianus River Preservation Comm. v. EPA*, 541 F.2d 899, 909 & n. 24 (2nd Cir. 1976), or in the Federal District Courts. *Schramm, supra*, 631 F.2d at 860; *Chesapeake Bay Foundation, Inc. v. U.S.*, 445 F.Supp. 1349, 1353 (E.D. Va. 1978). *But see Save the Bay, Inc., supra*, 556 F.2d at 1292-96 (District Court review available only to determine whether EPA has considered alleged violations of federal standards or has based decision on statutorily irrelevant grounds). Of the above cases, interstate pollution was involved only in *Schramm, supra*.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of true and exact copies of the foregoing Brief have been duly served by mailing, on this the 26th day of June, 1986, to the below-referenced counsel:

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